This file corresponds to the Introduction to Portuguese Criminal Procedural Law.
Initial part:
lessons from figueiredo dias compiled maria joão antunes (88-89)
criminal procedural law of maria joão antunes
criminal procedure code
Introduction:
The importance of criminal procedural law is measured by the means it shares with constitutional law and substantive criminal law in terms of protecting essential legal assets. Criminal procedural law is instrumental in relation to criminal law since a penalty or security measure cannot be applied without there being a trial and the intervention of the court (there is no penalty without a trial). This is not an absolute instrumentality, since even before the norm is breached, criminal law fulfills general prevention functions and, on the other hand, criminal procedural law goes beyond criminal law insofar as it protects people's rights. and intervenes as a limit to criminal law.
Criminal procedural law is not merely instrumental law in relation to criminal law. Between one and the other there is a mutual relationship of functional complementarity that, alone, also allows them to be conceived as participants in the same unit. This is particularly visible in the treatment given to both substantive and adjective questions. This relationship translates into influences of criminal law on criminal procedural law and influences of criminal procedural law on criminal law.
Regarding the influence that criminal law exerts on criminal procedural law, we can, from the outset, mention the issue of fragmentarity of intervention and subsidiarity of intervention. That is, substantive criminal law only intervenes when serious damage to essential legal assets occurs and when the intervention of the criminal branch is necessary given the insufficiency of the other branches of law. And from this comes a consequence at the procedural level, which imposes a certain plasticity on the idea of

the legality of procedural promotion. The MP is obliged to open an investigation whenever he hears of a crime and to prosecute when he collects sufficient evidence of the crime and its perpetrators. However, if substantive law does not punish everything and does not always intervene, this will also have repercussions on the procedural side, in the sense that, sometimes, the MP cannot accuse, even if such evidence exists, as an expression of the principle of opportunity .
Criminal law is based on fact, but gives substantial importance to both guilt and personality when determining the extent of the penalty. All of this is reflected in the criminal process. Non-imputability, in substantive criminal law, is a judgment that is doubly concrete, which is reflected in criminal procedural law. The question of the agent's non-imputability due to a psychological anomaly is raised and decided in the case itself, so it must be seen together with the assessment of the facts of the case, like any other question relating to guilt, with a unitary treatment of cases that lead to the application of a penalty and those that eventually lead to the imposition of a security measure - articles 1.º/a) and 368.º CPP. This is because, the declaration of the agent's non-imputability presupposes a link between the concrete act committed and the psychic anomaly - 20th CP - and it is a presupposition of the application of a security measure of internment the practice of a typical illicit act - 91st. CP. In the same vein, the principle of socialization of the agent and the requirement that the sentence expressly mention the grounds for the measure of the penalty - articles 40.º/1 and 71.º/3 CP - dictated that the determination of the penalty be given or the security measure has specific importance in the processing of criminal proceedings, examples of which are several articles of the CPP: 160th; 283.º/3/b) final part and c); 368th and 369th; etc.
In criminal proceedings there is a division of the hearing. We have a limited, mitigated bipartition. At the trial hearing the question of guilt is discussedand the issues are proved, but when deciding, the court decides on the issue of guilt and only then determines the sanction, and may request the opening of a hearing on the issue of determining the same, if it notices the lack of elements for the determination of the sanction. The hearing is unitary, but, at the end, it can be reopened to discuss only the matter relating to the bipartite sanction. This happens due to the weight of requirements related to the agent's conditions in determining the measure of the sentence, with there being a procedural moment in which all of this is analyzed. The Portuguese model in criminal procedural law is a limited cesure model, in which there is no division between the trial hearing and the production of evidence - 368º, 369 and 371º of the CPP.
However, criminal procedural law also influences criminal law, helping to limit the concept of crime by the functionality of the judicial machine. This will not be the dominant reason, however there are practical requirements that are imposed on criminal law through criminal procedural law. As for fragmentarity and subsidiarity, these are ideas that in some way reflect the requirement for functionality of the judicial machine - it does not always intervene, nor can it always intervene. For example, violations of the highway code were considered criminal offenses. However, as the volume of these cases grew, it became apparent that the courts could not respond. We are therefore talking about process functionality requirements that end up leading to an element of decriminalization. For example, the crime of participation in a feud - article 151 CP - arises due to the difficulty of proving who was the perpetrator of a homicide or a serious bodily injury. The difficulties in proving authorship led to the incrimination of participation in a fight, even if this participation does not result in injury, with simple participation being considered a crime. Thus, there are conducts that are only crimes for

procedural and practical reasons. Another example would be the crime of improperly receiving and offering advantages, as a form of corruption. Now, corruption requires proof of a link between the advantage and the employee committing an act contrary to the duties of the position. These tests are very difficult to carry out, as, many times, the advantages dissolve over time and the corrupt and corruptors act in a veiled manner. For all these reasons, due to the procedural difficulties posed by the typical requirement to carry out any act or omission contrary to the duties of the position in the crimes of active and passive corruption, the legislator now incriminates the undue receipt of advantages - 372nd CP.

There are institutes of a mixed nature between criminal law and criminal procedural law, being conditions of punishability and procedure, such as prescription, complaint and private accusation. Likewise, there is a parallel between the institution of dismissal from penalty - 74th CP - and that of archiving due to dismissal of penalty - CPP. For example: the complaint in cases of sexual harassment is a requirement that is directly linked to the victim - the lack of a complaint or the complaint itself is linked to the dignity of the conduct. The complaint is a requirement of the criminal dignity of the conduct itself, as well as a requirement of the process, important both from an adjective and substantive point of view. It all depends on the sphere of self-determination and whether the victim himself is offended by this. Thus, the complaint is a condition for incrimination.

The content of criminal procedural law encompasses the implementation of the practical content of the sentencing decision and the regulations regarding the executive effects of that same decision. Related to criminal procedural law, criminology and criminal policy are included. By denouncing the delinquency selection process and, in general, the discrepancy between the crimes committed and those reported, the crimes reported and the crimes prosecuted and between the latter and the crimes to which a final decision corresponds, the criminologistia reflects on formal instances of control that participate in the course of the criminal process, denouncing that the criminal is often not exactly the one who commits crimes, but rather the one to whom the stigma is successfully applied. Criminology points to the advantages of not discovering or sanctioning all crimes. This persecution of any and all crimes could even call into question the value of the norm that typifies it. Criminology also studies secondary victimization, that is, sometimes the victim suffers more from the process than from the crime itself, so the aim is to minimize this same victimization, especially in cases of crimes against freedom and sexual self-determination. Criminology's efforts to distinguish between petty and serious crime are also important for the delimitation of special processes in the criminal process, taking into account the degree of social harm and collective alarm they cause - 280th, 281st and 344th.

With regard to criminal policy, a political-criminal program based on the commandment of the need to protect legal assets and the reintegration of the agent into society is necessarily projected into the criminal process. It demands that the criminal process be speedy, that sufficient and appropriate emphasis be given to the determination of the sanction, that the resolution of the legal-criminal conflict also takes place through diversion mechanisms and that the accused and the victim participate in the administration of criminal justice, creating space for consensus procedural solutions. The DPP is also linked to other branches of adjective law, such as civil procedural law. Despite having become autonomous, it continues to have similarities today (concept of parties and procedural acts), even so it is impossible to disconnect from the general pretensions of the substantive law that corresponds to them.

Sources of criminal procedural law

Sources on the internal plane:

The main source of the DPP is the law, specifically the 1987 CPP, as a remnant of legalist positivism from the 19th century. Moments of significant changes can be listed: 1998, which allowed the trial of absentees; 2007 which established protection measures for the accused; etc. The current diploma enshrines an accusatory model marked by investigative principles, unlike the CPP model of 1929 which provided for a mitigated inquisitorial model.

However, the criminal procedure code is not the only relevant diploma in this matter. The constitution of the Portuguese republic is of particular importance, since both criminal law and criminal procedural law participate in the task of protecting the legal assets provided for by the constitution. There are constitutional norms with direct criminal procedural projection (1st, 20th, 27th, 29th CRP). Others, such as telecommunications secrecy (34th CRP), expressly provide for criminal procedural legitimacy as a condition of restriction. The fundamental rule of the DPP in the CRP is article 32 CRP - it is the criminal procedural constitution that establishes the guiding great charter of this branch.

• 32º/1 CRP: programmatic norm that enshrines the fullness of defense guarantees, including appeal. This idea must coexist with the minimum efficiency of the criminal process and with the protection of other legal positions, namely the victim. It enshrines the right of defense in a material sense.

• 32º/2 CRP: principle of presumption of innocence - the rule of treatment and judgment. The individual must be treated as presumed innocent and, therefore, aggressive means of investigation are excluded. If there is reasonable doubt on the part of the judge, the in dubio pro reo principle applies. There is a need for speed to prevent the sociological denial of the presumption of innocence - the process must be speedy not only in the interest of the effectiveness of the penal system, but also taking into account the restoration of legal peace for the accused. There should only be a case for prosecution if sufficient evidence of the crime and its perpetrators is collected.

• 32º/3 CRP: enshrines the right to defense in a technical sense. The argEveryone has the right to have a defender and to choose their own defender. In the USA, after 9/11, terrorists were given a defender chosen by state bodies - this is serious. The relationship between the defendant and the defender is very important. This norm conflicts with the ECHR and the ICCPR – it is said that the accused has the right to defend himself or to choose a defender, that is, it seems to be allowed in international instruments for the person to choose to appoint a defender or, if If you don't want to, defend yourself. However, the CRP anticipates that there are situations in which defense for defense is mandatory (CRP paternalism). The CRP does not enshrine a right to self-defense, and this does not exist, in principle, in Portuguese criminal procedural law. Thus, from the moment of the accusation, even if the accused expresses his own will, the law orders that he be appointed a defender, although, occasionally, the intervention of a lawyer may not be required.
• 32º/4 CRP: all acts that conflict with fundamental rights must be carried out by a judge. Here there is a jurisdictionalization of the phases of the criminal process, which are: investigation - up to the MP - trial - up to the court (investigation and trial are mandatory phases) and the intermediate phase of instruction (eventual and optional, as it requires someone to request its opening) is the responsibility of the investigating judge. The question arose as to whether the CPP rule was unconstitutional in this matter, since the investigation phase is the responsibility of the MP and this may also involve fundamental rights. The TC thus, in ruling 7/87, states that it is necessary to combine these norms with others that make up the constitutional text. The essential core of the guarantee of 32.º/4 is that acts in the investigation that relate to fundamental rights must be carried out or authorized by a judge - for example, 187.º/1 CPP, 179.º and 269.º/1 of the CPP, etc. The investigation phase, which in the 1987 CPP was understood as an investigation, is the responsibility of the MP, but also of the judge when there are acts that compress fundamental rights. We speak, for example, of acts such as home searches, wiretapping, coercive measures, etc. Furthermore, the aim is to make 32/4 compatible with 219 of the CRP, which intends to give the MP the power to accuse and direct the stage of proof of the accusation. In article 219 of the CRP it is said that the MP is the holder of the criminal action. It follows from the CRP that the person who has the competence to represent the state's punitive intention is the MP: he defends the accusation at trial, but also directs the investigation that leads to the accusation.
• 32º/5 CRP: the criminal process has an accusatory structure, as there is a material separation between those who investigate and those who accuse, to ensure the impartiality of the trial. In the trial, the adversarial process is guaranteed, as the defendant has the role of procedural subject with rights.
• 32º/6 CRP: guarantees the presence of the accused in procedural acts, namely at trial, in order to prevent a trial in absentia. The cases provided for by law are carried out, as well as cases in which the accused, correctly notified, does not appear at the trial hearing, which could result in a paralysis of justice.
• 32º/7 CRP: in Portuguese criminal proceedings, the offended/victim has the right to intervene as an assistant, assisting with the Public Prosecutor as such, or in some criminal mediation solution.
• 32º/8 CRP: it is the legislator himself who defines the absolute and relative prohibitions of proof.
• 32º/9 CRP: principle of natural or legal judge, essential in the distribution of jurisdiction by the courts.
• 32º/10 CRP: in administrative offense and sanctioning law, criminal procedural principles relating to hearing and defense must be ensured. Due to the punitive nature of administrative offense law, defendants must have minimum guarantees of defense.
The penal code is also a source, containing matters of a mixed nature, such as the complaint- 113.º and ss. CP- and clarifying the legal-criminal classification of the crime (public/partialular in a broad sense: semi-public or private in a strict sense). It should also be noted that there are separate diplomas, such as the witness protection law or the regulation of procedural costs.
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Sources at the international level:
• ECHR: in particular article 6. Any citizen can turn to this type of source when the sources provided for in the domestic direct plan have been exhausted. Citizens have direct access to the jurisdiction of the ECtHR, which controls the conformity of domestic law with ECHR standards and whose decision is effective domestically. The ECtHR's sources are directly binding on the parties and indirectly on other states that are not party to the dispute and that will be obliged to follow the instructions, as the decision admits erga omnes effectiveness. In other words, the decisions of the ECtHR bind the state party to the process, but also the states that are not party to the process, insofar as it establishes the interpretation of the norms of the convention itself.
• International Covenant on Civil and Political Rights: article 14 - establishes the right to silence and not contribute to one's own incrimination.
• European Union law: criminal law and criminal procedure constitute one of the last bastions of state sovereignty, therefore, harmonization efforts within the European Union show greater difficulty in criminal matters, as states are unwilling to make concessions. It is perhaps the last space of resistance for efforts to build European law. Even so, there is a path that began through the Schengen agreement in 1990 with the disappearance of internal borders that fueled phenomena of organized crime throughout the territory of the union and that can only be combatted through mutual cooperation between member states. On the other hand, we have a new form of crime against the interests of the European Union itself – there are supports and subsidies that are used in ways other

than those intended (e.g.: corruption, embezzlement of subsidies, money laundering). The union needs to respond to these situations, given the emergence of transnational crimes and crimes against the union's own interests. With the Maastricht treaty in 1992, the Schengen agreement was included in the union's acquis as one of its pillars. Europol is created, which is responsible for investigating transnational crimes in the EU, and also Euro-just, as a system of cooperation between judicial authorities, enshrining solutions such as the European arrest warrant, among others. The reinforcement of the third pillar was carried out with the Amsterdam treaty in 1998 and reinforced in Nice, in 2001. A common judicial space is a condition for the existence of freedom of movement.

Europol

Eurojust, 2002

The European Public Prosecutor's Office – 2017/2020

The European arrest warrant – 2002 (in Portugal in 2003) – when there are state borders and sovereignty, the punitive power is exhausted at these borders, in a classic system if someone is wanted by Portuguese criminal justice there will only be valid arrest warrants within the borders of the state, if you want to do it outside the state you have to use diplomatic mechanisms. This involves the possibility of issuing an arrest warrant that will operate within the physical limits of another member state.

The European investigation order – is a decision that determines the carrying out of certain evidentiary measures that are issued in one state to be carried out in another state.

Judicial cooperation in criminal matters is based on:

- harmonization of legislation
- principle of mutual recognition - there is no dissociation, the greater the harmonization of legislation, the easier recognition will be between states. However, there can be mutual recognition without full harmonization – states resist these harmonization efforts. Trust between legislation is needed and, for this, common parameters and general rules need to be created: on the investigation side, a lot has already been done – europol,eurojust, European Public Prosecutor's Office, etc. The common parameter in defense guarantees – appears as a roadmap for suspected and accused people in criminal proceedings, it came to fruition through 5 directives that intervened in various issues such as translation and interpretation up to the protection of the minor defendant and the guarantee of the presumption of innocence . Mutual recognition has a sword function (criminal guarantees, enhancing the effectiveness of criminal investigation, and a shield function (defense guarantees) increasing the defendant's defense guarantees in Europe.

Gap interpretation and integration

Interpretation

In the scope of interpretation, article 9 of the CC applies. We have two particular aspects:

• Interpretation in accordance with the CRP: we must be particularly attentive to the CRP when applying criminal procedural rules. This principle can be considered as a constitutional command for the judge, translated by article 204 of the fundamental law: the judge must seek to interpret the law in accordance with the CRP and, if he finds that there is a non-conformity, he must disapply the norm on the basis in its unconstitutionality;

• Relevance of the teleological element of interpretation: it is necessary to take into account the purposes and principles that guide the criminal process - which are the search for material truth, reestablishment of justice and legal peace and defense of fundamental rights before the state - and do a careful treatment of the teleological-rational element.

Integration

Regarding the integration of gaps, there are rules set out in the CPP, namely, article 4 of the CPP, which provides for the provisions of the code to apply in cases of omissions, by analogy. We have a triple gap integration method, so the last one is subsidiary to the previous ones:

Analogy: the solution eventually enshrined in the CPP applies to substantially similar cases. Analogy should not be used when it leads to a weakening of the accused - analogy in malem partem - that is, we can only use it when it does not harm people's rights. Let's imagine a case involving several defendants, all convicted. One of them can request the opening of an investigation and the rest cannot - this phase only involves the one who requested the opening of an investigation. The question that arises is: if the judge understands that the crime of which the defendant who requested the opening of an investigation is accused was not committed, hypothetically because there is not enough evidence of the commission of the same, we have to know whether this decision is used to the remaining defendants who did not request the pre-trial phase. The law, however, does not resolve this situation, so it is resolved through analogy. That is, despite the express admissibility of the use of analogy under article 4 of the CPP and unlike what happens in criminal law in article 1/3 of the CP, it is to be understood that the principle of criminal legality- article 29.º/1 CRP- extends to the extent imposed by its meaning content to the criminal process, as it is up to the latter to guarantee the defendant all defense guarantees- 32.º/1 CRP. This has the consequence that the analogy is not permitted whenever its application would result in a weakening of the position or a reduction of the defendant's procedural rights. Therefore, article 4 of the CPP must be interpreted in accordance with the CRP, under penalty of violating articles 29/1 and 32/1 of the CRP.

Rules of civil procedure that are harmonized with the criminal process: when there is no analogous case, we resort to civil procedural

law, as long as the rules do not conflict with the typical appearance of the criminal process and can be harmonized with the principles that guide the latter. The question of whether there can be a double degree of appeal when a fundamental question of law is at stake was discussed, applying article 672 of the CPC in a subsidiary way to criminal proceedings. The professor says that in this case there is no gap, since the legislator will have resolved the issue in adifferent in the criminal process, defining the criteria of criminal merit and double compliance for there to be an appeal from the court of the relationship to the STJ.

General principles of criminal proceedings: they are abstract, but we seek to extract ordering norms from them. These have a dual function: negative, limiting the application of civil procedural law, excluding the subsidiary application of the CPC, and positive, enabling this application when the rules of civil procedure do not conform to the appearance of the criminal process.

Class on 09/21/2023

Application of criminal procedural law

Material scope

Criminal procedural law applies to all concrete hypotheses to which substantive criminal law applies, with a coincidence although not absolute. If a certain conduct is a crime, the assessment of that conduct is carried out through criminal procedural law. However, there are matters that are not of a criminal nature and that are resolved in criminal proceedings:

• when the crime also generates civil liability - we have a criminal claim for punishment with a view to prevention and a civil claim for compensation for the damage caused. There is a principle of adherence - 71st CPP: two separate actions do not occur, the civil request occurs and is deducted within the criminal process.

• Crime and administrative offense situations that generate administrative liability - the legislator gives the criminal court the power to decide on administrative liability - article 38/1 RGC.

• Preliminary questions - sometimes in order to determine the existence of a crime it is necessary to resolve preliminary questions that are not criminal in nature. For example, if in the crime of theft there is no certainty as to who owns the stolen property of another, it is necessary to resolve this issue to find out whether or not the crime of theft has been committed.

Here it is important to know who owns the property, because there will only be a crime of theft if there has been a transfer of property, so that someone else's property can be taken away. These civil law issues, if dealt with by the civil courts, would cause a loss of speed. Therefore, the general principle of sufficiency applies - issues will only be decided outside the criminal process if there is no adequate solution - article 7 CPP.

Thus, we have situations here in which the scope of criminal procedural law goes beyond the scope of substantive criminal law.

Personal scope

Criminal procedural law applies to all people, national or not, to whom Portuguese criminal law is applicable, extending even to those who are not accused in criminal proceedings, for example, to those who make statements as an offended party or of witness. However, this rule does not invalidate the existence of exemptions based on precepts of international law, such as the convention on diplomatic relations. There are personal immunities under international law, which assist, for example, a head of state or a diplomat accredited to a foreign state, which relate to the need to guarantee that certain people with functions representing the state abroad, the can perform freely, without their possible criminal liability under the law of another country and their subjection to the respective judicial power, harming the normal development of international relations. There are also exemptions based on Portuguese constitutional law that do not exactly have the meaning of Portuguese criminal procedural law not applying to certain people, but merely making this application difficult and that, when there is room for it, it is carried out with regime specialties due to of the functions they perform. This is the case of PR- 130.º/1, 2 and 4 and 163.º/c) CRP; of deputies- 157.º/2 and 3 CRP; of government members- 163.º/c) and 196.º/1 CRP.

Space scope

The principle of territoriality provided for in article 6 of the CP applies here - criminal procedural law is applied in all processes in which the Portuguese courts have jurisdiction, even if the crime was committedbeen carried out outside Portuguese territory. The intervention of Portuguese substantive and adjective criminal law applies to crimes committed within national territory, but also outside when the Portuguese courts have jurisdiction for this purpose. In civil law and civil procedure, Portuguese courts may be called upon to apply the substantive law of other states and, therefore, there are norms of private international law, norms of conflict. In criminal matters, if the Portuguese courts have jurisdiction, only Portuguese criminal jurisdiction applies. There is also the possibility of carrying out procedural acts of Portuguese procedural jurisdiction in other states, within the limits established by treaties, conventions and international law. There will, however, have to be communication between the states to enforce the Portuguese criminal conviction decision - book V of the CPP - in the place where the other citizen is located. In addition to this, there is law 144/99, of August 31st LCJIMP, which regulates matters such as extradition, transfer of people, etc. These diplomas implement the principle of interstate legal assistance in criminal matters. Above these two laws, there is a general principle of prevalence of treaties and conventions of international law and the DUE over national norms. There are negative effects: someone who has already been convicted and served their sentence in a foreign country cannot be tried again. In cases where you have already been tried and have partially served your sentence, the discount principle will apply - 6th and 82nd of the CP. There are still positive effects. (review law enforcement in the criminal law

space).

Temporal scope

It is necessary, firstly, to draw the distinction between the scope of validity and the scope of effectiveness of the law, the validity comprises the period of time that mediates the entry into force and the cessation of validity of a law. As for effectiveness, in principle, the law is intended to regulate and discipline the facts that take place during its validity. Thus, in principle, these areas coincide and this coincidence is the general principle - article 12 CC. However, there may be situations in which they do not coincide:

• Sometimes a law comes into force and applies to previous situations or procedural acts - a situation of retroactivity of the law.

• It may also happen that a law ceases to be in force, but its application continues to occur in situations that occur after the end of its validity - situations in which the law is ultraactive.

In criminal procedural law, this application of the law to the future, that is, the fact that the law only applies to cases that occur after its entry into force and not to those that occurred before it, is contained in article 5 of the CPP and It is called the principle of immediate application, which we can call the expression tempus regit actum - criminal procedural law applies to procedural acts carried out after its entry into force, even if such acts are part of a process already underway. No. 1, 1st part: applies to all procedural acts that are carried out after its entry into force, even if these acts are part of processes that began before and even if this process concerns crimes that were committed before - tempus regit actum.

The procedural act we are talking about here is notification, recognition, complaint, etc. the trial hearing, for example, is made up of several procedural acts/fragments. When we talk about an act, we are talking about a legally relevant event included in the process. It is enough that the procedural act has not yet been carried out at the time the law came into force for the law to apply. However, it should be noted that: the new law will not be a supervening cause for the invalidation of procedural acts already carried out before its entry into force, as these acts were carried out in accordance with the law that was in force at the time of its practice - 5.º /1 CPP. Furthermore, there is the following specificity: in criminal procedural law, the relevant moment for thedetermination of the applicable law is the moment of the practice of the act that encompasses any procedural procedure and not the moment of the practice of the fact as results from the substantive law (article 2 CP).

This general principle of immediate application is disregarded in two situations:

The criminal process is not a disjointed sum of acts - it may happen that the entry into force of a new law that introduces a new discipline that did not exist before leads to the loss of harmony in procedural acts. In these cases, the legislator, in article 5.º/2/b) CPP, introduces a solution - if procedural harmony is affected, the new law will not apply immediately. Thus, the old law will continue to apply to processes pending when it ceased to be in force, while the new law will apply to processes that begin after its entry into force. Here we are dealing with a situation of ultraactivity of the law in cases where the application of the new law results in a loss of procedural harmony.

The criminal process does not contain a mere regulatory discipline, and the rules of criminal procedure may contain people's fundamental rights. In this matter, article 5/2/a) of the CPP applies - the new law does not apply immediately when its immediate application could result in a significant worsening of the defendant's procedural position, namely a limitation of his or her rights of defense.

It is with regard to the exception contained in article 5.º/2/a) that it has been understood that a distinction must be made within the criminal process between material or substantive criminal procedural norms and formal or adjective criminal procedural norms. Formal or adjective criminal procedural norms are defined in the negative, that is, they will be all those that are not material or substantive criminal procedural norms, relating, in particular, to the processing of the process. Material or substantive criminal procedural norms, in turn, are those that conflict with the defendant's fundamental rights, their procedural status or their defense guarantees. Basically, they are norms in which the fundamental guarantees of people are at stake. . Within these we encompass 3 groups of standards:

• The rules that deal with the realization of the criminal responsibility of the accused by establishing conditions of proceeding - complaint, private accusation, legitimacy for the complaint, termination of criminal proceedings, etc.

• The rules that relate to the status of the accused - means of proof, means of obtaining evidence, coercive measures, appeals, etc.

• The rules that define the main lines of the penitentiary and judicial system - the rules that establish the organization and jurisdiction of the courts.

In relation to formal or adjective criminal procedural norms, the tempus regit actum principle applies. In cases where we have a material or substantive criminal procedural norm, the doctrine defends an approximation to the substantive criminal law regime in terms of applying the law over time. The great precursor of this theory is Taipa de Carvalho, who argues that formal or adjective procedural norms must follow the same regime provided for material or substantive procedural norms - the principle of the most favorable treatment applies. Therefore, the relevant moment to determine the applicable law will be the moment of the commission of the criminal act, as happens under the terms of substantive criminal law - 2º/1 CP. In addition to this being the relevant moment, retroactivity of the law will be permitted when it is more favorable to the defendant. It will be prohibited, following the logic, when it is most unfavorable to the defendant. In other words, according to Taipa de Carvalho, if a new law emerges, it may be applied retroactively if it is more

favorable to the defendant - retroactivity in bonam partem. If its retroactive application is unfavorable, retroactivity in malem partem is prohibited. This author understands that this article 5 is unconstitutional because it violates article 29 of the CRP, which applies to both types of rules.

Therefore, according to this last perspective andIn short, when a rule regulates a material procedural rule differently, the new law can only be applied to processes that have been initiated after the law came into force, since the criterion is the moment the act took place. The retroactive application of unfavorable criminal law is therefore prohibited and the application of the law in force at the time of the commission of the act or the retroactive application of favorable criminal law (which decriminalizes or lightens the penalty for this conduct - retroactivity in mitius) is required. This understanding is not supported by other authors and jurisprudence due to its difficulty in practical application, and two fundamental criticisms can be outlined here:

The application of this solution requires comparing all the legislation that exists from the moment the act was committed, which could make the process ungovernable and extend the defendant's guarantees too much.

The criminal process is not a bilateral relationship, but rather a triangular one established between the defendant in the process, the state and the victim. Therefore, it is necessary to take care of the victim's position.

The doctrine has argued that the substantive criminal law regime only applies, as Taipa de Carvalho argues, when the complaint, private accusation and prescription are at stake, that is, institutes on which the implementation of criminal responsibility depends. For example, if the prescription period was 10 years and a new law changed the period to 8, the new law will apply as it is more favorable. Let's imagine that the new law did not change the deadline, but added a suspension period. If that were the case, it would make the statute of limitations longer, meaning the old law would apply. The criterion moment would therefore be the moment of the commission of the act in accordance with articles 2 and 3 of the CP - because it was the law in force at the date of the commission of the act. In other cases, it depends on the moment in which the expectation - theory of expectations - was consolidated. The principle of non-retroactivity is linked to the protection of trust. Now, the criterion moment may not necessarily be the commission of the act, as it is not always at that moment that the defendant's expectations are consolidated. Thus, the criterion moment must be found on an individual and case-by-case basis, that is, the requirements of applying criminal procedural law over time must be guided by the expectations to be regulated in each case. It therefore makes sense that, when norms that conflict with the realization of the criminal responsibility of the accused are at stake, the criterion moment is the moment of the commission of the act.

In turn, in terms of appeals, the understanding that has been developed by the STJ in ruling 4/2009 is that it defends the idea that the new law should only not be applied when it comes into force after the first instance decision, as it is believed that it is only from that same decision that the defendant's expectations can be called into question, that is, at the time of appeal, the expectation is consolidated when the decision of the court of first instance. Here the criterion moment being the practice of the fact would be excessive. In the remaining standards, it is analyzed on a case-by-case basis when the expectation should be consolidated. The expectations theory is defended by Mario Chiavario. Therefore, we always have to find out the following:

• Does the new law contain material procedural rules? If not, the tempus regit actum principle applies, unless the situation falls within the exception of article 5.º/2/b). If so, we disregard this principle and compare the law in force at the time of the act and the new law. If the new law is favorable, it applies retroactively. If it is unfavorable, its retroactive application is ruled out. Retroactive because the process already started before it came into force.

• In another situation, if the new law were to shorten, for example, the degrees of appeal, for the legislator, this law weakens the defendant's position (5.º/2/a)) applying only to processes initiated after the its entry into force and those already pendingold law. For Taipa de Carvalho, the law in force at the time of the commission applies, since, by shortening the appeal stages, the new law would be more unfavorable. However, the STJ said that the protection of expectations only crystallizes when the first instance decision is handed down. Therefore, the defendant's position will only be weakened if the new law is intended to be applied to decisions already given by the first instance. If the new law comes into force before this decision, the new law applies to the case, as it does not affect the defendant's expectations.

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Other temporal issues

This regime has implications for several matters. It may happen that a semi-public or private crime in the strict sense is converted into a public crime. Are we facing a material procedural rule? Yes, since it conflicts with the realization of the criminal responsibility of the defendant. So what would be the solution to give? We would have to find out whether the new law, once compared to the old law, is less or more favorable to the defendant. In this case, the new law would no longer be favorable and its retroactive application would therefore be prohibited. If the example were the opposite, and the new law were to convert a public crime into a semi-public one, for example, or private in the strict sense, we would also have a material procedural norm, which contends with the realization of the criminal responsibility of the defendant, but this law would already be more favorable to the same, which would allow the retroactivity of the same in bonam partem. If we have a new law that classified an old public crime as semi-public, for a process that was already pending, the fact that the MP initiated the process without a complaint does not invalidate the acts already carried out, since the

consequences of the new law will apply just for the future. However, the offended party may withdraw the complaint. Regarding deadlines, it may happen that the new law may change, for example, the deadline for filing a complaint. If the deadline is extended, there is a material procedural rule that conflicts with the realization of the defendant's criminal responsibility and that is more unfavorable to him, therefore, the old law applies and the retroactivity of the new law is prohibited in malem partem. If the complaint period is shortened, then, again, we have a material procedural rule that also contends with the realization of the defendant's criminal responsibility, but which is now more favorable to him. Therefore, the new law applies, allowing retroactivity in bonam partem. When does this more favorable period for the defendant start to run? It starts counting from the moment the new law comes into force, so that the position of the victim of the crime committed is also protected. This would not be the case if, counting the deadline under the previous law, there was less time left to end the deadline than under the new law. That is, unless, starting from the new law, the deadline for filing a complaint was longer than that which the victim could initially count on - this results directly from article 297/1 CC.

Procedural statics

We talk about the structure of the Portuguese criminal process and more specifically about the procedural models. Before studying the procedural models, we have to talk about the purposes of the criminal process. We can understand the purposes as functions/sociological meaning or as a more axiological sense, the latter of which refers to the values

that the criminal process must follow. The sociological sense deals with the functions that the criminal process is called to perform in society. Within the meaning of functions, there is an author called Niklas Luhmann for whom the criminal process is a system within the global social system and performs a function of legitimizing the decision, absorbing the protests that may arise against it. He accepted this view for all processes and not just for the criminal process. The defendant may not be satisfied with being convicted, but if the procedural rules were respected, the defendant will also respect the decision.As for the axiological meaning, Figueiredo Dias refers to 3 purposes:

The discovery of the truth and the realization of justice: the essential purpose of the process is the realization of justice, therefore, a fair decision is one that is based on true factual assumptions. This realization of justice has as its essential condition the discovery of the truth. It follows that, in criminal proceedings, the discovery of the truth is more important than in civil proceedings and, in support of this, Figueiredo Dias refers to the discovery of material truth. In criminal proceedings there is a greater demand in the search for the truth as close as possible to the historical fact, such material truth. In civil proceedings, if the author, by hypothesis, withdraws from the request, the law conforms to this truth. The professor avoids this expression, because the idea that an absolute truth can be reached is, in Ferrajoli's expression, epistemological naivety, a dangerous illusion. We only access the truth through the senses, which end up being limited and can betray us. The process aims to learn about facts that occurred in the past and the instruments available to learn about those same facts are limited. Furthermore, it is a dangerous illusion because it has historically led to the elimination of any moral scruples in the search for this absolute truth (e.g. torture), and therefore, the discovery of the truth must always take place within a framework of respect for fundamental rights. of people.

Respect for people's fundamental rights: the protection of fundamental rights within the scope of criminal proceedings assumes special relevance with regard to the limits imposed on the state's investigative activity within the scope of criminal proceedings, particularly notable in matters of evidence. This means that the process serves to prevent fundamental rights from being excessively compressed. Thus, valid information obtaining models are established. For example, telephone tapping is only permitted in the most serious crimes. Likewise, coercive measures must also comply with legal requirements so that they do not excessively violate the fundamental rights of the person to whom they apply.

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Restoration of individual and community legal peace: at the individual level of the accused, the speed of the process is necessary, which is related to the presumption of innocence - 32nd CP - and the legal peace of the same. From the community's point of view, there is a demand for a correct decision that convicts the guilty and acquits the innocent, and that is more closely related to the commission of the crime, that is, to the occurrence of the facts. It is necessary to reestablish the community’s trust in the legal system. From the point of view of the definitiveness of the decision, it is important that the decision is definitive, so that there is no perpetuation of the conflict. Legal certainty, confidence in the law and stability must be reinforced, with several institutes that pursue this definitiveness as the case res judicata.

These purposes are often antinomic, it is not possible to fully safeguard each of them and it is necessary to find a balance between each of them. Now, this balance is found by the legislator. The purposes of achieving justice and restoring legal peace, for example, may be in conflict, and it may happen that a definitive decision has to be given up if it is substantially unfair. When there is this conflict between justice and legal security, the legal system provides mechanisms to overcome the limit of res judicata, allowing extraordinary appeals (for review) - an appeal against a decision that has already become final and unappealable is admitted when there is a decision that seriously violates the justice- 449th CPP. Having completed this descriptive exercise of the different purposes of the

process, it is clear that, not infrequently, these take on a conflicting nature, and it is necessary that, through a criterion of practical agreement,In practice, the purposes are combined. It must be ensured that all purposes are pursued, without affecting the essential core of each of them through a mutual compression of the scope of each principle in the sense of their compatibility. This compression, in accordance with the principle of proportionality, will have to be limited to the minimum necessary to allow the resolution of this conflict. This practical agreement, however, cannot lead to a violation of human dignity. Any solution that leads to this must be repudiated. Ex: a solution that involves human torture.

Theoretical models

The analysis of the matter relating to procedural models can be carried out from two points of view: a first that looks at procedural models as historical types, categories that allow identifying the characteristics of procedural law at each moment in history; a second, which views them as abstractions, theoretical categories at the service of the study of criminal procedural law. It is this last perspective that we will follow. Theoretical models are abstractions arrived at through real procedural models. In this context, we distinguish between the accusatory model and the inquisitorial model. The Portuguese procedural model is adversarial, as is clear from article 32/5 of the CRP. However, this classic typology between an accusatory and inquisitorial model does not solve the problems of classifying procedural models. This is because, currently, there is, on the one hand, an accusatory model from Western Europe that comes in line with a medieval inquisitorial tradition and, on the other hand, a pure and American accusatory model, also known as the Anglo-American, accusatory model. of parties or adversarial model. Since both models are called accusatory models, and their distinction would become confusing, Mirjan Damaška establishes a distinction between:

• Hierarchical or vertical model: corresponds to the Western European model;

• Parity or horizontal model: which corresponds to the pure and American accusatory model.

Let's start with the classic dichotomy that distinguishes between the accusatory model and the inquisitorial model:

• Accusatory model: the principle of accusation is in force, that is, a material separation between those who judge and those who accuse. Why should this separation exist? To guarantee impartiality and independence, the judge is conditioned by the previous investigation. The judge assumes a passive role - our system is accusatory, but integrated into the principle of investigation, with the judge having the power-duty to order the production of any means of evidence that helps to discover the truth (340.º/1 CPP) . There is a position of parity between the prosecution and the defense regarding their procedural rights, even though they have different statutes. Centrality is attributed to the judgment, which is the central axis of the process, which is marked by the characteristics of orality, immediacy, contradiction and publicity.

• Inquisitorial model: there is confusion between both entities, as it was the judge who investigated the crime, carried out the investigations and subsequently condemned or acquitted. Thus, the functions of investigation, accusation and trial would all fall to the judge. Here the judge has broad initiative and control over the evidentiary matter, so his role is not necessarily passive, but active. The judge could of his own motion order the production of evidence, even if it had not been requested by the parties. Here there is an inequality of positions between the prosecution and the defense - the defendant is the object to whom the case was made. Here the central axis of the process is the instruction/investigation, there is an essential secret nature of the investigation and the use of the evidentiary material obtained at the trial stage. These investigation phases are secret and written. As for the trial, it was marked by publicity, especially in terms of the execution of the sentence, in order to dissuade individuals from committing crimes.

Our systemma is an accusatory system, integrated by the adversarial principle, in accordance with CRP- 32.º/5 CRP. But this adversarial system is very different from the American adversarial system. The configuration of the courtroom itself is different, and our configuration is close to the inquisitorial model, with the defendant sitting in a central and stigmatic location. In the North American system, the word “trial” ends up designating two distinct phases: the one that is in the “trial” trial and the activity that is developed “pre-trial”, which is a pre-procedural activity, private and the responsibility of the parts. In Portuguese law, the investigation phase is part of the process and this investigation carried out in the investigation is documented in writing, not serving as a rule to be used in the trial, with the defendants having to be heard again. However, these statements are documented in the records and the judge receives them, therefore, he can be influenced by reading them.

We will now see the dichotomy between the hierarchical or vertical model and the parity or horizontal model:

• Hierarchical model: there is a fragmentation of the process into distinct phases that follow each other over time, with the process being a staggered and ordered succession of different phases. There are multiple levels of decision-making, allowing resources to be accepted more naturally and without major obstacles. There is a duty to justify decisions that assumes a guarantee and functional dimension in relation to the appeal. On the one hand, this reasoning consists of the fundamental assumption of the exercise of the right to appeal, given that if it did not exist, it would be more difficult to enable the assessment of the sentence by the higher courts. On the other hand, it allows the decision to be explained to the community, making it understandable. Furthermore, it functions as a guarantee of the rationality, weighting and transparency of court sentences. There is complete documentation of the procedural progress, which is linked to the fragmentation of the process, as it contains several levels of decision. Documented evidence has repercussions in the trial, which does not mean that the law always admits that documented evidence can always be valued at trial. In our system, the

investigation is a phase of the process, so all investigative steps taken by the Public Prosecutor's Office are transferred to the judge at the time of the trial. Although there is a prohibition on the principle of valuing personal evidence produced during the investigation phase - 355 et seq. of the CPP - these elements, as already seen, are documented in the records and can exert a strong influence on the judge's convictions.

• Parity model: procedural activity focuses on the trial. There is only one decision-making level, and the resources are exceptional, even if they are seen as a guarantee of defense. There is, therefore, a single decision-making level. In North American law, appeals are more counted, even due to a different interpretation of the principle: the 5th amendment to the US constitution enshrines a double jeopardy clause or “double jeopardy” - appeals are revocation, so, if there is appeal against an acquittal decision in favor of the defense, the higher court revokes the decision and orders the file to be dismissed, that is, the decision is overturned and the file is sent to the first instance so that the trial can be repeated. Therefore, only in very specific situations is it possible to appeal against acquittal decisions, as this would violate the “double jeopardy”. The duty to state reasons does not exist when it comes to matters of fact, since there is no appeal against the verdict of those judged, which is unassailable. There is no need to document the procedural progress, as the decision is based on materials produced orally at the trial hearing. Only the evidence produced at the trial hearing is valid. In the absence of documentation, what comes to the attention of the court is only what it can consider.

We can now analyze the inquisitorial and accusatory model from a historical point of view.

Historical modelsHigh Middle Ages - VI-XII

Period during which the model had an accusatory structure. There was an accuser who began the case with a private accusation and then the judge evaluated the evidence and the decision resulted from this evidence. The judgment was based mainly on the result of the test, with the judge having a fundamentally passive role, with the test not having a demonstrative function, but a decision-making one. Once the accusation was made, the person against whom it was made had to remove the evidence of the crime through one of the means that the law made available to him according to his social class. These means of proof were of 3 types: ordeals; purgatorial oath and duels. The ordeals could involve a red-hot iron, which was placed in the accused's hand and the hand was turned on to heal, seeing how the wound developed. If it evolved into a cure, the accused was innocent. The judge limited himself to checking the progress of the wound, it was God who decided. There were also cold water ordeals, in which the accused was thrown into a river or lake and if he emerged he would be blamed. Ordeals were reserved for servants, while the purgatory oath was reserved for the clergy and duels for knights.

In the 9th centuries, during the late Middle Ages, this model broke down for moral reasons, as the church said that ordeals and duels were not desirable because they were contrary to the teachings of the Bible. The most appropriate procedural form to punish crimes would be, not one in which the judge waits for the accusation, but rather one in which he begins by investigating rumors, suspicions, infamies, etc. for himself. in order to initiate the process ex officio. There were also reasons of an epistemological nature: we look at the ordeals and realize that there are thoughts that are fallible. If it appeared that the decision was outside the judge's subjectivity, the “evidence” could be subject to manipulation, putting the divine nature of the judgments into crisis. From this period onwards we call into question this evidence and its validity.

Late Middle Ages XIII-XV

From the 12th and 13th centuries onwards, this previous discredit was added to a social and economic evolution that led to the birth of large societies, an increase in crime and large urban agglomerations. There was a transition from an accusatory model in which the judge waited for a private accusation, to an inquisitorial model. The judge is now in charge of initiating the process, giving rise to the process per inquisitione and now taking into account the principle of officiality. The entity that initiates the process is the same one that judges, so there was no guarantee of impartiality towards the judge. We move to rational means of proof, with the fourth Lateran Council, ordeals and duels are prohibited. Witnesses, documents, etc. appear as means of proof. The value of these means of proof was pre-fixed through general and abstract rules and hierarchical in a system of legal evidence that had at the top the notorious (triggering crime or authentic documents); full evidence (consistent testimony from two witnesses who declared in the same sense); semi-complete evidence (report from a witness or two who are suspicious or incapable, or by witnesses who were not in agreement and private documents); mere clues.

Since there was a high requirement to convict, it was necessary to obtain notoriety or full proof, which proved difficult to obtain. It is not always possible to obtain the offending crime and proof through documents is residual and it would not be easy to find witnesses who agree on the facts. However, as the desire to discover the truth was the most important of the desires, to obtain it, means that undermine fundamental rights were legitimized - torture. The easiest proof to obtain was a confession, so the defendant was subjected to torture to make him confess. The authors began to attribute notorious value to the confession, which now had probative power, admitting an increased value.

Modern Age XVI-XVII

The inquisitorial model transitioned to secular justice and experienced successive hardening over the centuries, with the centralization of political power and the emergence of states. We were faced with an aggressive inquisitorial model. However, from the 16th century

onwards, with the centralization of political power and the notion of punishment that emerged, procedures were created to prevent people who resisted torture from being absolved. There was no concern with the acquittal of innocence, the culprits were not wanted to be acquitted. Among such expedients, as no guilt could be left free, a system of proof arithmetic emerged: full proof was necessary to convict, so if semi-full proof was combined with other evidence, there was full proof and certainty as to the conviction. Thus, probative values

were added - for example, two semi-full tests would be equivalent to one full test. Extraordinary sentences were also permitted, which consisted of lighter sentences than normal. Torture was admitted as a reserve of evidence, however, even when the person resisted torture and was acquitted, the process did not result in an acquittal of the accusation, but only in an acquittal of the instance, so it could be reopened if new evidence emerged. .

Enlightenment and French Revolution

Throughout these centuries, the conviction was created that the system in force was fatally wrong: torture was not compatible with the exaltation of man's natural rights that began to be affirmed in the system of legal tests of this period. It was with the Enlightenment that this practice was put to an end and confession was devalued as a means of proof, creating a new criminal procedural model with an accusatory basis, based on the definitive acquisitions of English procedural thought. The thinkers Rosseau and Voltaire took concrete action at this stage through writing pamphlets where they denounced judicial errors, seeking to intervene in favor of the defendants. Thus, at this time we had pamphlets that were small, lively and emphatic texts where topics on the philosophical agenda of the time were discussed. One of the best-known cases led to the text of the 1763 treatise on tolerance by Voltaire, denouncing the case of Jean Calas, a Protestant merchant from Toulouse, whose son committed suicide. Suicide as a doubly infamous crime led to the punishment of the corpse being dragged through the streets of the city and refused a Catholic burial. The parents did not want their son's corpse to suffer this and hid the true cause of death. The son's murder is suspected and the father is tortured and ends up being unjustly sentenced to death. Voltaire writes this treatise in 1763 debating injustice and religious intolerance. These criticisms led to an erosion of the inquisitorial system and with the French revolution this model was replaced by an accusatory one. With the advent of the Enlightenment, the belief in the natural rights of man and the affirmation of rationalism, it was no longer considered that the inquisitorial system marked by torture and legal evidence would be a legitimate model for the criminal process. The worldview of the liberal state that emerged in the 21st century. XVIII starts from a state-individual relationship completely opposite to the previous one, now the subject is considered autonomous, endowed with original and inalienable natural rights. The criminal process becomes an opposition between the state's interest in punishing crimes and the individual's interest in avoiding any measures depriving their freedom. Now such an opposition must be fair, and to this end the subject must be guaranteed means that are as close as possible to those available to the state. It began to be believed that the errors in judgment that led to innocent people being convicted were not exceptions, but rather the result of a system full of errors. They largely censored the arithmetic of the test. Criminal procedural law becomes an order limiting the power of the state in favor of theaccused individual. Here there is a need to separate the investigating entity from the judge, the principles of the device, the passive judge, the formal truth, the evidentiary self-responsibility of the parties, the presumption of total innocence of the convicted person until sentencing. Other very relevant aspects would be the contradictory principle. The creation of a strict system of legality of evidence (whether in its production or in its valuation) and guaranteeing an equal procedural and pre-procedural position between the accused and the accuser.

Reformed criminal procedure

With the French revolution, the inquisitorial model was replaced by the accusatory one. This French model, introduced after the revolution, implied the existence of an indictment jury and a trial jury. This investigation was conducted by representatives of the people, with inspectors monitoring the regularity of this investigation. It wasn't completely secret, but it wasn't public either. A jury system was introduced, meaning that those who decide whether the case is put to trial are the group of lay people drawn from where the defendant came from, with a trial jury who were responsible for judging, that is, deciding to convict or acquit. This jury system was incompatible with the legal evidence system, since the latter presupposes knowledge and ability to correctly manage a complex system of rules. The system of intime conviction was instituted, believing in the jurors, as they would have no reason to unfairly punish the defendant, nor to acquit if he was guilty, believing that they would only tell the truth. Jurors were asked to answer whether they were convinced of the defendant's guilt and, depending on that conviction, they would convict or acquit. Instructions for jurors were contained in article 342 of the French criminal instruction code of 1808. This system, introduced with the French revolution, did not resist the inquisitorial attacks and soon in that code a certain transition to a mixed model began to be felt, which it combined accusatory characteristics in the trial phase and an inquisitorial model in the investigation phase, eliminating the indictment jury and following the traditional forms of the investigation model. The investigation phase took precedence over the trial phase. The investigation was the whole and had a preponderant weight.

This criminal process with a mixed structure throughout the 19th century and especially in the 20th century, suffered hardening with the

formation of totalitarian states in Europe, thus prevailing a mixed inquisitorial or formal accusatory model. Our 1929 code was very similar in essence to the Rocco code of Italy. The Portuguese model was, in this period, of a mixed inquisitorial structure, with the MP being responsible for accusing and the judge being responsible for judging, however, the MP was accusing based on an investigation carried out by a judge who would be the same one who would carry out the trial. The body of the crime (set of evidence collected in the investigation phase) was formed by the same judge who would conduct the trial, and therefore there was a merely formal accusation, with no impartiality on the part of the judge. At the end of the 70s, after the world wars and on April 25, 1974, the accusatory model that we know today was introduced.

This continued to occur in Europe, but when it came to English law the process was different. Here, when the Norman kings crossed the sea and invaded England, they sought to impose their power, so there were delegates from the king who traveled to the localities and carried out administrative, fiscal and judicial control. There is an institution that was created with administrative and fiscal purposes, but that becomes a judicial institution and that gives rise to jurors. This institution was made up of a group of people of recognized repute, residents of the land and who were responsible for reporting to the delegates the crimes of which they were aware. They did so under oath. These people who committed crimes were judgedted through the traditional means of trial: ordeals, purgatory oath and duels. When ordeals and duels were banned, it became difficult to know how to judge. In fact, a jury system was established in English law for trial, which was initially only optional. Only the accused who wanted to be subjected to a jury trial could submit to it, and if they did not want to, they would be subject to the traditional means. When these means were abolished, the jury trial proved to be the only way to proceed with the trial, however, the idea that it was optional was maintained and, in order to subject people to this system of trial, a procedure was established in 1275 - the prison forte et dure. The latter consisted of locking the accused in prison with his chest pressed against the iron, feeding him one day with hard bread and the next drinking water until he agreed to submit to the trial; it was indifferent whether he declared himself innocent or guilty. This method was used to force a person to submit to trial. It was a different torture from that used in continental law, since torture was not used to force a person to confess, but to force them to submit to trial. Refusal of trial later became equivalent to a confession and the person would be sentenced later. From the 19th century onwards, refusal of trial became equivalent to a declaration of innocence and the person would be tried. In English and North American law, there are many expressions that come from French due to this historical antecedent, such as the expression grand jury. Jurors initially decided as oracles, not based on the evidence, but were asked to deliver a verdict. They were not asked to justify their verdict based on evidence; jurors did not have to justify their conviction. The verdict was sovereign, final, and irreversible, with no possibility of appeal, just as ordeals were definitive. This explains the resistance of these systems to appeal, which was only introduced into the common law DP in the 19th century. XX century, and until then there were none. To this day, appeals are very limited in acquittal decisions. There was also inquisitoriality in English law. From a certain point onwards, heresies began to appear and, at the beginning of the 15th century, with the proliferation of heresies, inquisitorial methods of prosecuting were introduced. There were two courts that operated in an inquisitorial manner, which were the courts of royal prerogative:

• High commission court – offences of an ecclesiastical nature;

• Star chamber – resolved disputes of a civil nature, crimes against the state (except for treason which justified the death penalty or dismemberment, since only common law courts could apply the death penalty or dismemberment), and administrative crimes.

These were inquisitorial models and were copied from the continental model that was already in force in continental Europe. Torture was permitted, but in a more residual form. These models had a short lifespan, more or less between the 15th and 18th centuries. They were less prevalent because they were a residual system alongside the common law system, which did not allow torture and trials were conducted by juries. It was this system that the French wanted to copy, copying only the visible part, the juries. In England, juries in the 18th century were no longer the same as in the 13th century. In the 18th century, there was already a set of rules of evidence – the law of evidence – designed to prevent jurors from allowing their convictions to be contaminated by less reliable evidence, less trustworthy because in the 13th century jurors decided according to their convictions because they knew the accused. And the law of evidence was developed. When the French copied, they only copied the most visible part of the jury system and not the law of evidence, and so this system had little success in France and continental Europe, and now it hardly exists. It is not surprising that the English and northern systems-American are a system of parties, in which the judge has a passive role, the decision is up to the jurors and they decide with their free conviction without justifying their decisions and there is little possibility of appeal, especially when the decision is absolutist. We can also see that in our system, although accusatory, the judge is given great predominance. The judge is not passive, having intervention in the evidentiary activity, not only because it is understood that the discovery of the truth is an essential purpose of the process and should not be left to the care of the parties, but also because the judge has never been passive in continental Europe, always playing a very important role in research. It is now up to the judge to judge, but I wanted to leave some capacity to the judge: the capacity and competence to fill gaps in the evidence of the prosecution and defense.