This file corresponds to the Current System and Principles of Procedural Promotion of Criminal Procedural Law in Portugal.

Current System

The crp, in its article 32 crp, says that our model has a mainly accusatory structure, which means that our model meets these two fundamental requirements, according to figueiredo dias: a) enshrines the principle of accusation: there is a material separation between the entity that investigates and accuses and the entity that judges. This separation cannot be merely formal, as was implemented in the 1929 criminal procedure code. It must be a material separation. In the 1929 Code of Criminal Procedure, it was the judge who was responsible for judging and who prevented the production of evidence. they need to be different people. How do you guarantee that the separation is material? through impediments, namely that of article 39º/1/c) crp. In Portugal, the competence to initiate the process lies with the MP, in accordance with the principle of officiality, which exercises its competence linked to the law. b) the defendant cannot be a mere object of the civil process, that is, he is a procedural subject, holder of procedural rights and powers (right to appoint a lawyer, right to request production of evidence; right to request opening of investigation; right to lodge an appeal; right to be heard, etc.). is a constituent participant in the process. however, it does not lead to a purely adversarial model. the judge does not remain passive, but rather has the power-duty to investigate the facts subject to trial, so he can of his own motion request evidence not presented by either the prosecution or the defense.

Principles of Portuguese Criminal Procedure

The principles of criminal procedure are important for a normative reason. the principles consist of the fundamental political-axiological options that guide the criminal procedural system, being the basis of the concrete normative configuration. its relevance also manifests itself at the level of integration of gaps (article 4 cpp), as they can be criteria for their integration. figueiredo dias organizes these principles taking into account 4 different nuclei:

• principles of procedural promotion

the principle of officiality

the principle of legality

the principle of accusation

• principles relating to procedural progress

the principle of investigation.

the principle of sufficiency.

the principle of contradiction.

the principle of concentration.

• principles relating to proof:

the principle of investigation.

the principle of free assessment of evidence.

the principle of in dubio pro reu.

• principle relating to form:

the principle of advertising.

the principle of orality.

the principle of immediacy.

There are principles that do not fit into this organization, such as the principle of fair trial/equitable process and the principle of presumption of innocence. as for the principle of fair trial, it is enshrined in article 6 cedh and article 14 pidcp, and is also present in article 20º/4 crp. This principle emphasizes a procedural dimension of justice. In light of this principle, a decision will not be fair just because it leads to a fair result, but also because it uses instruments and methodologies that are fair, correct and respectful of the fundamental rights of the subjects involved in the process. If we can consider a decision that condemns an individual who has committed a crime to be fair, we cannot consider this process fair if the agent was tortured to reach that conclusion. Thus, this principle functions as a clause encompassing all of the defendant's rights of defense/procedural guarantees (article 32/1 crp). In this way, it is possible to extract from this principle rights of defense for the accused that do not have a concrete normative consecration (non-standardized rights). This is because the rights of defense expressly provided for do not exhaust the list of rights that can be recognized to the accused, as there are rights that can be extracted from the principles of the process, namely, throughYou are based on the principle of fair trial. Article 20/4 does not only refer to the defendant's guarantees, but also to the guarantees of all the people involved in the process, intending to provide a basic criterion to order the conciliation of the interests of all procedural subjects. There are authors who also derive from this principle the idea of

equality of arms between the prosecution and the defense (principle of equality of arms). However, in criminal proceedings, it is natural for there to be an asymmetry of procedural roles between the MP and the accused/defense (the MP has recognized powers that the

defense does not have and vice versa). this principle must, then, be read in the sense that, if arithmetic equality of arms is not guaranteed, the reciprocity of rights in order to produce evidence must be ensured, in the process. thus, the principle will determine that there is equal possibility of access to evidentiary sources by the defense and the prosecution. that is, the means of proof must have equal effectiveness regardless of their source. Furthermore, it requires that this de facto asymmetry be compensated with the attribution of rights to the accused that it would not make sense to attribute to the prosecution (e.g. the right to silence, the presumption of innocence and the prerogative of being able to speak last at the trial hearing), but also the enshrinement of the possibility of appeal as a guarantee of defense (article 32/1 crp). The other above principle is the presumption of innocence which is enshrined in article 32/2 crp, as well as in article 14/2 pidcp and in article 6/2 cedh. This principle has, in our legal system, a double dimension, valid both as a rule of treatment and as a rule of judgment. As a rule of treatment, this principle makes it possible to contain abuses of state power, considering as illegitimate all procedural measures applied before the final judgment that are incompatible with the possibility of being applied to an innocent person. This is because the defendant may be acquitted at trial. assuming that the accused is guilty, it is easier to accept certain measures, such as preventive detention or telephone tapping. However, if it is assumed that, on the contrary, that person is innocent, the application of these procedural measures may only be accepted in more restricted cases and upon compliance with certain requirements. therefore, coercive measures can only be applied that are compatible with the possibility of being applied to an innocent person (art 60 and 61/3/c) cpp). As a rule of law, the presumption of innocence imposes on the prosecution the burden of proving the defendant's guilt, prohibiting the imposition of that burden on him. This results in 3 consequences: the burden of proof – decision-making rule: it must be the prosecution that proves the defendant's guilt. the standard of proof: a conviction must be established that goes beyond all reasonable doubt, under penalty of the in dubio pro reu principle functioning (decision must be absolutist). that is, the defendant cannot be convicted if a certain threshold of conviction has not been reached. o privilege against self-incrimination: it is necessary to avoid the defendant's contribution to evidence (avoid self-incrimination). in other words, the MP and the judge must rely on evidence that does not force the defendant to talk about the charge itself or to confess to the charge (it will only function as an epistemic source of information). Having followed this path, it can be said that preventive detention, as a measure of deprivation of liberty, would be incompatible with the presumption of innocence in its dimension as a rule of treatment. however, the crp expressly provides for this possibility, ruling out possible incompatibility. The regime applicable to preventive detention is different from that applicable to prison sentences. such a distinction occurs, from the outset, regarding the very purposes of coercive measures, which aim to respond to a periculum libertatis. that is, situations in which the freedom of the defendant determinesprevention requirements that relate to endoprocedural reasons and that are legally provided for. There is, therefore, a set of legal requirements to be met so that coercive measures can be applied. In this sense, preventive detention cannot be seen as an anticipation of the prison sentence that follows the individual's conviction, because, unlike the latter, preventive detention does not have punitive purposes (it does not aim to pursue exo-procedural purposes). This is why, when pre-trial detention is applied, pre-trial detainees must be separated from convicted prisoners, with different penitentiary rules applying to them. Finally, it should be noted that the presumption of innocence is also linked to the speed of the process, given that the longer a process takes, the more the stigma that the accused is guilty is created.

Principles of Procedural Promotion

Principle of Legality

By virtue of the principle of legality, the MP is obliged to promote the process whenever it acquires news of a crime and to bring charges whenever it collects sufficient evidence of the commission of the crime and who was its agent. Perceived as a principle of procedural promotion, the MP is required to exercise his powers in the process, not according to a margin of free appreciation, discretion or opportunity, but in a manner linked to legal provisions. the principle of legality arises from article 219.º/1 of the crp when the MP is granted the exercise of criminal action guided by the principle of legality and from articles 262.º/2 and 283.º/1 of the cpp: • the news of crime always gives rise to the opening of an investigation, even if, in the case of an anonymous complaint, there is only space to open an investigation if the requirements of 246.º/6 cpp are met • the MP is required to deduct the accusation if , during the investigation, sufficient evidence was collected regarding the practice of a crime and its authors. If these indications are not met, the law requires that the investigation be archived, according to article 277.º/2 of the cpp. in the case of archiving, there are two types of archiving: o when there is proof that that person did not commit the crime - 277º/1 cpp - definitive archiving; or when procedural prerequisites are missing - 277º/2 cpp - non-definitive archiving, that is, this type of archiving occurs when the MP has no evidence that could subsist in the conviction at trial, being a conditional archiving, because if the missing evidence appears , the process can be reopened - 279.º/1 of the cpp. compliance with the duty to promote the process whenever news of a crime is acquired and to bring charges whenever such evidence is collected, is controlled by the request for opening an investigation - 286th and 287th cpp and hierarchical intervention - 278th and 279th/2 cpp. In addition to this judicial and hierarchical control within the scope of criminal proceedings, restricted to the decision to submit the case or not to trial, disciplinary responsibility may also be added for violation of professional duties - 204th, 205th and 214th/a) of the statute of the public ministry. Criminal liability may also be added under the terms of article 369 of the CP, in cases of denial of justice and malfeasance. Furthermore, in general, the fact that it is a hierarchically

subordinate judiciary and the possibility, however remote, of political control will always apply. The concrete configuration of the criminal process in the investigation phase, handing over the functions of investigating and prosecuting to the public prosecutor's office, assumes that control over the exercise of criminal action occurs hierarchically. Therefore, the procedural law does not provide for any mechanism to control the decision not to open an investigation against the provisions of article 262/2 cpp, in violation of the principle of legality of procedural promotion. the non-forecast does not mean that the omission is not controllable, but rather that the power of direction of the hierarchical superior of the ma.registered that he did not proceed with the opening of the investigation, in addition to the disciplinary power. One of the consequences of the principle of legality is the principle of immutability of the public accusation, according to which, there can be no waiver or withdrawal of the accusation that the MP has deduced. Why do we accept the principle of legality? in its origins it is linked to inquisitorial models and is based on retribution, it must always be punished. The abandonment of these absolute/retributionist conceptions of the ends of sentences and their replacement by preventive conceptions led to a certain erosion of the principle of legality. the principle of legality seems to oppose an understanding regarding the purposes of penalties such as that adopted by article 40 of the cp, from which it could be concluded that the crime should only be prosecuted when this proves necessary in light of the purposes of prevention general positive and special prevention. the purpose of the penalty is now to prevent crime and protect legal assets, so it should only be pursued when these prevention requirements actually take place – if the penalty is not necessary, there is no need to prosecute the agent. the principle of legality is better understood at first and is more difficult to understand in this preventive/relative conception of the purposes of sentences. We currently accept the second conception (preventive/relative) of the ends of sentences. that is, the penalty is applied in order to protect the community, reinforce the community's trust in the incriminating norm and reintegrate the agent into the community. It is important to understand that this contradiction between the current purpose for which the penalty is directed and the principle of legality is merely apparent. in fact, there is true compatibility between the theses of general positive prevention and special prevention that are adopted in our penal system, and their link to the law. Firstly, the principle of legality is what best responds to the requirements of a rule of law which is necessarily based on a principle of equality, avoiding differentiated legal treatment in similar situations. Furthermore, this principle makes it possible to preserve the independence and impartiality of judicial authorities. It is in this way that the principle of legality is articulated with an understanding regarding the purposes of the sentence: in the best way it guarantees a reinforcement of confidence in the criminal justice system. • principle of equality - article 13 crp. • principle of the rule of law - article 2 crp. • guarantees impartiality and independence of the administration of justice. • we have a third reason: by strengthening the community's trust in the administration of justice, the general right to prevention associated with punishment is reinforced. deviations from the principle of legality we can identify some limitations or deviations from the principle of legality. In line with the principle of opportunity or open legality, the law specifically establishes mechanisms that allow the solutions it generally imposes to be ruled out, allowing the MP to act in a more flexible manner taking into account political-criminal considerations. It cannot be said, however, that these norms attribute true discretion to the MP's activity, but rather that they allow the closer connection to the law to be tempered in some way with this type of considerations, granting spaces of opportunity. This happens mainly at the level of small and medium-sized crimes, and less formalism can be distinguished in the decisions of processes in their field, unlike what happens in the context of decisions on more serious crimes which, in general, will result directly from the law. These deviations from the principle of legality provided for in the law correspond to the so-called mechanisms of procedural diversion, as they allow the path of the process to diverge. Articles 280.º, 281.º/1 to 7 and 282.º cpp, as procedural diversion mechanisms, allow a diverted, amusing solution from normal processing, translating, in a certain sense, a limitaction to the principle of legality, insofar as they constitute an alternative to indictment. despite having collected sufficient evidence about the commission of the crime and its perpetrators, the MP, instead of indicting the case, may close the case by dismissal and penalty, under the terms of article 280, provisionally suspend the case in accordance with article 281. We can also mention criminal mediation, although this does not represent an alternative to prosecution. more recently, in the 21st century, to these concerns about the agent, due to the search for non-stigmatization of the defendant and less intervention from the formal control system, concerns about the victim are added, which emerge from a specific area of

criminology- victimology . the concern for the victim is based on: • on the one hand, in order to avoid secondary victimization - the evil of the crime being added, from the victim's perspective, to the evil of the process; • on the other hand, ensure criminal solutions that do not involve exclusively the application of a penalty or security measure, but that aim above all to repair the damage caused to the victim of the crime.

Deviations - The Paradigm of Restorative Justice

With this new perspective comes the paradigm of restorative justice, which aims to avoid phenomena of secondary victimization and which is based on the idea of

valuing the role of the victim in the process, as a fundamental agent or actor. restorative justice is concerned with the specific victim, and not just with future and potential victims, because when someone who committed a crime (attack on a community legal asset) is punished, that person is punished to protect that legal asset. the legal asset is protected for the future, preventing other crimes from being committed in the future. The traditional model of criminal law is concerned with potential and future victims. The restorative justice model is concerned with the specific victims – with the specific person who suffered an attack on their physical integrity. as? giving them an active voice in the process, avoiding the so-called “theft of the conflict from the victim” and ensuring that, at the end of the process, the solution involves repairing the damage that the specific victim suffered and not just the application of a sentence. from the point of view of satisfying the interests of the specific victim, the penalty says little. the restorative justice model starts to worry about the victim in the dimension of ensuring, through the criminal process, the repair of the damages that the victim suffered. especially in the provisional suspension of the process and in criminal mediation, the concern for the victim adds to the classic concerns with the stigmatization of the agent. in the provisional suspension of the process, there is an ordinary mechanism for provisional suspension of the process and, then, there are special forms of provisional suspension of the process, provided for in article 281.º/7 and 8 – in crimes of domestic violence and in crimes against freedom and sexual self-determination of minors. In these cases, it is not the concern for the agent that is at stake, but, above all, the concern for the victim – avoiding the harm that the process can do to the victim, compensating for the fact that these crimes have been converted into public crimes, giving the victim a voice, and allowing the process to end before trial and ensuring, when justified, compensation for the damages that the victim has actually suffered. It is not mandatory, but in the provisional suspension of the process in numbers 7 and 8, various injunctions and rules of conduct may be imposed on the defendant, namely, that of compensating the injured party or giving him adequate moral satisfaction. therefore, the process becomes directed not towards the general interest of punishing the agent, but towards a concern for the victim. The same thing happens in criminal mediation. Increasingly, voices are emerging to establish a tripartite system of criminal reactions: the penalty; o security measure; o adds reparation. This speech in favor of a tripartite system was not entirelyimplemented in our legal system, but there are manifestations of an importance, whether substantive or procedural, of reparation: o reparation of the damage caused by the crime is a factor in determining the measure of the penalty (article 71). The subsequent behavior of the agent, which includes repairing the damage, is a mitigating modifying circumstance - it not only influences the concrete measure of the sentence, it can also lead to a lowering of the maximum limit of the framework. is one of the conditions of the prison sentence suspended upon its execution. The suspended prison sentence is not just a different form of imprisonment, but a different, non-custodial sentence. it can be a simple suspension, but it can be with injunctions/imposition of duties on the convicted person, namely, the duty to pay compensation to the injured party. is a criterion for dismissal of sentence (article 74 cp). From a procedural point of view, compensation for the injured party is an aspect to consider in the dismissal of a sentence, in the provisional suspension of the process, in criminal mediation. We do not exactly have a tripartite system of criminal reactions (penalties, security measures and reparation), but what is certain is that reparation is important and has resonance, both on a substantive and procedural level.

The Deviations In Concrete

Thus, the procedural diversion mechanisms, in particular, are three: archiving by dismissal of sentence - 280th - provisional suspension of the process - 281st and 282nd - and criminal mediation, regulated by law 21/2007, of June 12. All these mechanisms presuppose that the process ends before the culminating moment of the trial and that it is thus avoided, even though a penalty may be imposed on the agent. in the case of dismissal of penalty and provisional suspension of the process, the process ends before the trial and there is no place for the imposition of a penalty. • archiving by dismissal of sentence (280th cpp) this mechanism is only applicable to petty crimes, that is, to crimes whose prison sentence does not exceed 6 months, or which are punishable only with a fine sentence that does not exceed 120 days , as is clear from article 74 of the cp. Under the terms of article 280 of the CPP, the MP, anticipating the future decision in the trial, may, for reasons of procedural economy, immediately close the case with the agreement of the criminal investigation judge. Basically, this mechanism applies to situations of petty crime that do not require a penalty. as requirements for exemption from sentence, article 74 of the cp provides for the following: o abstract gravity of the crime: crimes punishable by a prison sentence of no more than 6 months or a fine of no more than 120 days - article 74/1 cp + other crimes that they admit despite the frame being more serious throughout the cp. for example, article 143º nº3 cp, article 250º nº6 cp, article 374º - b cp. o concrete gravity of the infraction: it is necessary that, in concrete terms, the gravity of the offense and the agent's guilt are small - article 74/1/a) cp. o prevention requirements: these requirements cannot prevent archiving due to exemption from sentence – article 74/1/(c) cp. it is decided by the MP at the end of the investigation, since, if filing for dismissal of sentence is an alternative to prosecution and if it is up to the MP to accuse, it is also up to him to file for dismissal of penalty, but the agreement of the jic is necessary, 280º /1 cpp, according to the principle of reserving the judicial function, provided for in article 202.º/1 crp. In this case, as we are still at the end of the investigation phase and there has been no accusation, the defendant is not given a voice. Is this JIC agreement simple or does the JIC have a supervisory, surveillance and control role over the verification of assumptions? the answer seems to be the latter. the jic has to monitor and control and, obviously, justify its decision. The judge may not agree, for example, because he understands that there is not enough evidence of the crime and its perpetrators. and if the filing for dismissal of sentence occurs after having alreadyhave charges

been brought? the MP may have accused and the accused may have requested the opening of an investigation. here, the decision is up to the jic, who can file the case for dismissal of the sentence, with the agreement of the MP (the roles are reversed), as well as the agreement of the defendant - he may want his image to be safeguarded in the trial, 280º/2 cpp, and may be interested in proving his innocence. This need to hear the accused only arises when the MP has already been accused. therefore, at the end of the investigation, the MP decides, with the agreement of the criminal investigation judge. At the end of the investigation, if there has been an accusation, it is the criminal investigation judge who decides, with the agreement of the MP and the accused. and if the assistant requested the opening of an investigation, after the investigation has been closed, can the investigating judge decide to close the case by dismissing the sentence? in article 280 cpp, the law only refers to cases in which the public prosecutor's order is indictment. That said: the law does not regulate the hypothesis that there has been archiving, the assistant has requested the opening of an investigation and now he intends to file it due to a waiver of the sentence. If this second hypothesis is not provided for by law, is it possible or not? it seems that we are facing a gap, which must be filled in the general terms of article 4: the first, by analogy: the law regulates the hypothesis of an accusation, opening of investigation and archiving due to dismissal of sentence. we must extract from this solution, one that must be valid for cases in which there has been archiving and instruction and is intended to be activated by dismissal of sentence. Archiving must be admitted, upon decision of the judge, with the agreement of the MP, but, eventually, waiving the need for the defendant's agreement. why? The defendant's agreement is necessary when there has been an accusation, because it is already a solemn call to criminal responsibility on the part of a judicial authority. If the dismissal of the sentence occurs at the end of the investigation, before the accusation has been made, the legislator dispenses with the intervention of the accused. if it happens at the end of the investigation, but in a situation in which the investigation ended with the filing and not with an accusation, then there was also no such solemn call to responsibility and, therefore, the defendant's agreement can also be dispensed with. in the dismissal of sentence, we have simple fun, because no freedom restrictions are applied to the defendant, the case is archived without further ado: o a different filing from article 277, because, in this filing by dismissal of sentence from article 280 .º, the public prosecutor orders the archiving, despite being convinced of the existence of sufficient evidence of the crime, and that the person who committed it was the defendant. o in the filing of article 277, there is either not enough evidence or there is no proof that the person committed any crime. It is different from the point of view of the presumption of innocence and from the point of view of social censorship of conduct that there is still, in some way, a warning given to the agent. the MP, being convinced that there is evidence of the commission of a crime, can simply understand that there were no prevention requirements to be taken into account and, therefore, the person will probably be exempted from the sentence and, to that extent, for reasons of procedural economy, it is better archive the process, avoiding losses from the point of view of procedural economy and the stigmatization of the agent. • provisional suspension of the process (281st and 307th cpp) deals with a diversion mechanism with intervention, since, with the provisional suspension of the process, the process is not definitively archived, but suspended for a certain period of time by imposing the accused of rules of conduct or injunctions, as shown in 281.º/1. If the defendant does not comply with the rules of conduct or injunctions or if he commits a new crime of the same nature, the suspension is revoked and the process continues, in accordance with article 282/4. is called theprovisional suspension of the “fun with intervention” process, because, unlike the dismissal of the sentence, in its general regime, injunctions or rules of conduct are imposed on the defendant, that is, restrictions of rights, not deprivative of liberty, functional equivalents of feathers. These are not real penalties, because the provisional suspension of the process is not a condemnatory decision, unlike the decision in the summary process. but, in fact, the legal restrictions have the material content of the penalties and, hence, the functional equivalence thought in relation to the two. In this matter, the principle of in dubio pro reo is valid. To avoid this consequence, the doctrine points to another foundation, linking in dubio pro reo to the principle of the rule of law - resulting in a need to impose limits on the exercise of the state's criminal persecution, which are justified both in crimes that presuppose guilt, and in matter of applying security measures in typical illicit acts committed by an unaccountable person. This solution, which shifts this principle to a broader and more general idea, eliminates the constitutional support of in dubio pro reu and makes ordinary law solutions contrary to it legitimate. Cristina Monteiro advances as a basis the duty to justify decisions since, if there is no reason to justify that decision, then it cannot be taken. the professor considers that the basis must continue to rest on the principle of presumption of innocence, but this must be understood not as an adjective correlate of the principle of guilt, but in a broader sense, all the assumptions on which the application of penalties and measures depends of security. thus, it would make it possible to include any assumptions on which the state's criminal persecutory intervention depends, without failing to include security measures. If the judge has a doubt in the interpretation of a legal type, he must use the general criteria for the interpretation of legal norms, article 9 of the CC, and not the in dubio pro reo principle. Does the violation of this principle presuppose a question of fact or a question of law? it has been understood that it constitutes a question of law, but there is only a violation if the judge has expressed doubts and resolved such doubts in a way that is unfavorable to the defendant. for example: there are doubts as to whether the victim consented to the practice of an act of sexual rape, so the judge, faced with doubt, takes as proven the fact that the victim did not consent. How do you resolve such doubts? It all depends on the fact on which the doubt concerns. If the doubt arises from a fact that concerns the practice of an incriminating type, the judge declares the facts as unproven and absolves the accused from the case. If the doubt concerns an aggravating circumstance or qualifying element of the type, the

judge declares the fact as not proven and sentences without the aggravating substance or without the qualifying type. If the doubt is about a cause of justification, the judge considers the fact to be proven and acquits the agent. If the doubt concerns a mitigating modifying circumstance, it is proven and condemns taking into account the mitigation. Are the objective conditions of proceedability also covered by this principle? Under these conditions, the existence of the process is at stake. With the broader reading we made of the in dubio pro reo principle, these conditions are also covered by it, as those assumptions that we saw that would become part of the principle are not only substantive, but also procedural. the legislator establishes exceptions to the in dubio pro reo principle in certain areas: • crimes against honor - article 180 cp: establishes a specific cause of justification that translates into proof of the truth of the accusation. proof of the truth of the charge must be made by the defendant, so if he cannot prove it, the corresponding fact is considered proven and the defendant is convicted. the doubt is resolved in favor of the defendant. It has been understood that this articleis not unconstitutional, as there is no introduction of the presumption of guilt, since the departure from the in dubio pro reo principle is done in a very limited way that does not violate the presumption of innocence, since in addition to being limited, the departure is justified since it represents the counterpart of an area of

risk permitted in crimes against honor. • economic-financial crimes: these crimes, such as corruption, embezzlement and others that generate large economic profits, are difficult to investigate, because they have no concrete victim and have effective concealment mechanisms, such as tax havens. here, the behaviors are very fluid, their meaning of action is important. It is to overcome these research difficulties that solutions have been proposed that translate into the removal of in dubio pro reo. Law No. 5/2002 establishes measures against this crime, enshrined in its articles 7 and 9, through the mechanism of extended confiscation of assets. It is assumed that all assets inconsistent with their net income come from the benefit of illicit activity, which may go beyond the direct proceeds of delinquency. This is a iuris tantum presumption, which can be rebutted by the defendant, if he can prove the lawful origin of the assets. The doctrine understands that, considering the loss of assets as an administrative measure of deprivation of assets, it is not unconstitutional. It is intended to deter the commission of the crime, and does not affect the core of the legal-criminal qualification of the conduct. however, it must be applied in criminal proceedings, in order to safeguard the defendant's defense guarantees. Another solution that is not enshrined in law, but is discussed and the legislator has already tried to introduce it, but always with the veto of the constitutional court, is the criminalization of illicit or unjustified enrichment: it consisted of the application of a prison sentence of up to five years, if the defendant was unable to prove the lawful origin of his assets. the constitutional court understood that this measure is unconstitutional, as it completely reverses the in dubio pro reo principle.

Class on 11/8/2023 and 11/9/2023

There are two types of provisional suspension of the process: a general regime, also called ordinary provisional suspension; and two special regimes - 281.º/8, 9 and 10. special regimes are provided for: o crimes of domestic violence not aggravated by the result; o crimes regarding the freedom of sexual self-determination of non-aggravated minors. o crimes of “shoplifting”, a case of simple theft where the things taken are at the free disposal of whoever steals them, indicative of a lesser degree of illicitness and guilt. This is a private crime, which involves the appointment of an assistant and the payment of legal costs, culminating in the demobilization of the filing of complaints, which then relieves the judicial machine. o ordinary suspension/general regime: applies to phenomena of small and medium crimes. presupposes a formal requirement of the abstract gravity of the crime, as set out in article 281/1, in the case of crimes punishable by a prison sentence that does not exceed 5 years or with a different sanction of imprisonment and in which the requirements are met provided for in the paragraphs of the same article. in terms of the concrete gravity of the infraction, the degree of guilt and illegality cannot be high, which does not mean that it has to be low, under the terms of 281.º/1/e). note the difference in wording between this paragraph, which speaks of the absence of a high degree of guilt, and article 74.º/1/a) of the cp, regarding the exemption from punishment, which speaks of a low degree of illegality and of guilt. One thing is a “small degree” and another thing is the “lack of a high degree”. a material requirement of the unnecessary penalty is required, provided for in 281.º/b), c) and f): the penalty cannot be necessary. the penalty will not be necessary when it is verified that that person has not been previously convicted of a crime of the same nature – if he has been, the possibility is frustrated.of suspension, there are special prevention requirements to be taken into account - it is necessary that no provisional suspension has been previously applied for a crime of the same nature, for identical reasons, and it is expected that compliance with the injunctions and rules of conduct sufficiently meet the prevention requirements that, in the case, are felt. What are the injunctions and rules of conduct that can be applied to the defendant? They are those of no. 2. It could be, for example, paying compensation to the injured party, giving the injured party adequate moral satisfaction, such as a public apology, not frequenting certain places, not accompanying certain people. The provisional suspension of the proceedings is determined for a period that can go up to two years - article 282.º/1. If the injunctions are complied with, the public prosecutor archives the proceedings and they cannot be reopened - article 282.º/3. If the injunctions are not complied with, the proceedings continue and what was provided is not repeated - article 282.º/4. The power to decide lies with the public prosecutor at the end of the investigation, with the agreement of the JIC and the defendant. Under the terms of article 281.º, paragraph a), the agreement of the defendant is

required, to whom restrictions of rights will be applied through injunctive measures and rules of conduct, and therefore the defendant may wish to have his or her case examined at trial. The agreement of the assistant is also required, whose position does not have to be substantiated, also under the terms of 281.º/a). If the assistant does not agree, the suspension of the proceedings will not be carried out. The agreement between these two subjects of the proceedings appears as a legitimizing element for the application of this mechanism. Both the agreement of the assistant and the agreement of the defendant are two formal requirements. The law does not mention the agreement of the victim, but of the agreement of the assistant, and the question may arise as to whether, in cases where the victim has not constituted himself an assistant, he or she must give his or her agreement. The question is reasonable, because the injured party may constitute himself or herself an assistant at any time during the proceedings. It may happen that the injured party wants to become an assistant, but has not yet had the opportunity to do so in the proceedings. It is natural that the injured party, even if he wants to become an assistant, has not yet done so. Therefore, the fact that the injured party has not become an assistant does not necessarily reveal a lack of interest on his part in the outcome of the proceedings. If it could be inferred from the conduct of the injured party that he does not become an assistant that he is disinterested, it would be reasonable not to ask him for his consent. But the truth is that the provisional suspension of the proceedings occurs very early in the proceedings – the person may not have lost interest, but has not yet requested it. Therefore, it seems to Professor Sandra Silva that the injured party should be heard, at the very least, the injured party should be heard regarding the provisional suspension of the proceedings, giving him the possibility of requesting his constitution as an assistant so that his consent is required. It should be noted that the application of this mechanism will always depend, according to article 281.º/1, on the agreement of the public prosecutor and the criminal investigating judge, precisely because injunctions and rules of conduct are functional equivalents of penalties, constituting interventions in the subject's freedom. This requirement for the judge's agreement results from judgment 7/87 of the tc which considered the application of this mechanism solely on the basis of the agreement between the defendant and the assistant, contrary to the provisions of article 32.º/4 of the crp and what results from article 202 thereof. It is also important to mention the case-law establishing judgment no. 16/2009 of the stj which determined that the disagreement of the investigating judge in relation to the determination of the provisional suspension of the proceedings by the public prosecutor under the terms of 281.º/1 is not appealable. o special cases of suspension: the cases of provisional suspension of the proceedings provided for in numbers 8, 9 and 10 of article 281 no longer properly comply with the teleology and the political-criminal framework of the institute, as they areHere we are dealing with a way of “mitigating” the public nature of crimes of domestic violence and crimes against the sexual freedom and self-determination of minors, strictly in accordance with the interests of the victim. As Costa Andrade says, it is easy to intuit that the number 8 “represents a foreign body in the sense, in the teleological rationality and in the political intentionality to which, in general, the regime of provisional suspension of the process follows”. In special cases of provisional suspension of the process, the concern is with the victim. In both cases, these are situations in which the crime was converted into a public crime, despite the plausibility of the hypothesis that the victim herself does not want the process, because it leads to her secondary victimization. In these cases, the legislator sought to compensate for the conversion of these offenses into public crimes by giving the victim the power to, if desired, put an end to the process at an early stage, so that the victim can avoid the harm it causes. Basically, what it's about is giving the victim an active voice and preventing the conflict from being stolen from the victim. When a crime is committed, a social conflict opens, which, in the traditional conception, is a conflict between the defendant and the community. but, in fact, the crime also affects the person who was its victim and, therefore, in some way, alongside the conflict between the perpetrator of the crime and the community, there is a conflict between two people. As we, in the traditional conception, understand crime as an offense against community legal assets, there is a temptation to “steal the conflict from the victim” – the state replaces the victim in managing the conflict and does not respond to their will and needs. interests. this, above all, in crimes that the state itself considers most serious: public crimes. In the case of domestic violence and the minor's freedom of sexual self-determination, the crimes are serious and, therefore, the legislator understood them as public crimes. but these are crimes in which the personal dimension of the conflict is more present and the concern with the effect of secondary victimization must be greater. the state must not entirely replace the victim and must not conduct the process against the victim's will, in an attitude of great paternalism or great insensitivity. The law says that the provisional suspension of the process takes place upon: the free and informed request of the victim. The initiative is given to the victim and mere agreement is not asked. In the case of crimes against the freedom and sexual self-determination of minors, in the case of minors, autonomy is no longer presumed. In this case, the public prosecutor decides, but in the interest of the victim and not in the interest of the community, nor of potential and future victims.

Note: the ruling of the STJ (auj) number 4/2017 states that the principle of discounting the penalty (additional driving disqualification, for example) to be applied, in relation to the time spent in compliance with the suspension injunctions, does not apply provisional sentence, in the event of a subsequent trial, triggered by non-compliance with the aforementioned injunctions established by the provisional suspension of sentence. It is questionable whether such an understanding does not violate ne bis in idem. article 281.º/7 indicates that the suspension decision, under number 1 of that article, is unchallengeable (the judgment itself), this being consistent with the circumstance that we are not faced with strict legality, but an “open legality ” to political-criminal considerations.

• Criminal mediation: criminal mediation was introduced in Portugal in 2007. the law was approved and came into force in 2007, largely

due to the influence of international instruments to which Portugal is bound. had some impact, always in the order of two hundred and the number of cases referred to criminal mediation progressively fell, until, today, it is not possible to know how many cases are conducted by criminal mediation – necessarily less than 5 – because the information is covered by a statistical secret. the criminal mediation regime provided for in law nº21/2007, of June 12, also translates into a limitation of the principle of legality, insofar as the public prosecutor refers the case to mediation, at any time during the investigation, if evidence has been collected that a crime has occurred and that that the defendant was his agent (article 3). However, this is not exactly an alternative to the accusation, since the referral is sufficient with the existence of evidence (the existence of sufficient evidence is not required) and can occur at any time during the investigation. To a political-criminal framework that is common to cases of archiving in case of dismissal of sentence and provisional suspension of the process, there is added the purpose of the criminal legal conflict being resolved with the intervention of a third party - the mediator, who will be responsible : o promote rapprochement between the accused and the offended party and support the attempt to actively find an agreement that allows for the repair of the damage caused by the unlawful act and that contributes to the restoration of social peace - article 4. there was a failure of criminal mediation. What about your regime: do public crimes not admit criminal mediation? articles 2/1 and 2. public crimes do not admit criminal mediation. only semi-public and private crimes: in relation to semi-public crimes, there is a further restriction - only semi-public crimes that are against people or property. The legislator nevertheless excludes certain situations from the scope of criminal mediation: crimes punishable by a prison sentence of more than 5 years do not allow criminal mediation. Furthermore, these cannot be crimes against sexual freedom or self-determination, perhaps because it was understood that it was too great a form of violence for the victim to be placed face to face with the perpetrator. Corruption or influence peddling are also not permitted in the crimes of embezzlement2: these are crimes within the sphere of corruption. In these crimes, criminal mediation is not permitted, because, in essence, criminal mediation involves negotiation to avoid a sentence and it would be irreverent for anyone who commits crimes of corruption and, therefore, negotiates the powers of their position, to also be able to negotiate to free from punishment. Mediation is not permitted when the offended party is under 16 years of age, because mediation assumes that there is a certain equivalence or equality between the offended party and the defendant. There is also no mediation when summary proceedings or extremely summary proceedings are applicable: because they are more established forms in judicial practice. Criminal mediation was still an institute of an experimental nature and it was understood that the summary or very summary form should prevail over criminal mediation. o Once these requirements are met, how does criminal mediation take place? the case can be referred to criminal mediation in two ways: a. or the MP decides to refer the files to criminal mediation at any time during the investigation when it has collected evidence that a crime has occurred and that the defendant was the agent, and because it considers that through criminal mediation it is possible to adequately respond to prevention requirements of the case (article 3/1); B. or the offended party and the defendant may have to resort to criminal mediation, in cases where it is permitted. this is less likely to happen, because, if criminal mediation is only permitted in crimes whose criminal procedure depends on a complaint, it is not likely that the offended party will complain – want the process – and, immediately afterwards, be willing to, giving the hands to the defendant, wanting to agree a consensual solution with him. mediation ends with an agreement (the reparatory agreement) that has limits, which are established in article 6: o it is said that depriving sanctions cannot be foreseen; for example, in a crime of harm to physical integrity, it cannot be expected that the defendant will be deprived of his liberty; o duties that offend the dignity of the defendant cannot be foreseen and duties that last for more than 6 months cannot be foreseen. if the agreement meets all the conditions, it is sent to the mp, who, if the agreement is signed by airguido and offended party, approves this agreement, its approval by the public prosecutor being equivalent to the withdrawal of the complaint by the offended party and the non-opposition by the defendant. although the reparation agreement is irrevocable... the agreement may or may not be complied with: if it is complied with, there is nothing necessary; but if it is not complied with, the offended party may renew the complaint within 1 month (article 5.º/4). the reparation agreement aims to restore social peace. criminal mediation is of subsidiary application, relevant only when summary or very summary proceedings are not applicable - article 2.º/3, e).

Principle of Officiality

According to the principle of officiality, the initiative to investigate the practice of an offence and the decision to submit it to trial lies with a public, state entity. It does not therefore lie with a private entity, such as the offended party or other persons. this principle is adopted in article 219.º/1 crp, when the public prosecutor's office, as a state entity, is granted the power to exercise criminal action. In the CPP, Article 48 grants the Public Prosecutor's Office legitimacy to promote criminal proceedings, being responsible for acquiring the report of a crime - Article 241 of the CPP - and, in particular, receiving complaints and reports and assessing the follow-up to be given to them under the terms of Article 53.2/a) of the CPP. It is also responsible for closing the investigation once the report of a crime has been investigated and deciding whether to file or bring charges, according to Article 276.1 of the CPP. In turn, Article 119.b) determines the sanction of nullity when there is no promotion of the proceedings by the Public Prosecutor's Office under the terms of Article 48, its failure to do so constituting an incurable nullity. This is the rule, but it involves deviations that translate into limitations and exceptions to the principle of officiality: limitations arising from the existence of semi-public crimes and private crimes in the strict sense. semi-public crimes, crimes whose criminal proceedings depend on a complaint, such as, for example, articles 143.º/2 and 178.º/1 and 3 of the

criminal code, constitute a limitation to the principle of officiality, insofar as it is necessary for the injured party or other persons - 113.º criminal code - to inform the public prosecutor of the fact so that it can promote the proceedings - 49.º/1 and 2 criminal code. These merely constitute a limitation to the principle, since it is then up to the public prosecutor, once the investigation has been closed, to archive it or bring charges - 276.º/1 ex. vi. 283.º criminal code. without prejudice to the holder of the right to complain - 113.º criminal code - being able to withdraw it until the publication of the first instance judgment and provided that there is no opposition from the defendant, who is thus given the opportunity to assert his innocence before the court - 116.º/2 criminal code and 51.º criminal code. If the criminal proceedings are initiated without a complaint, there will naturally be a link to the lack of a procedural prerequisite which, when detected, determines the termination of the criminal proceedings. In this type of crimes, the appointment as an assistant is not mandatory and it is up to the public prosecutor at the end of the investigation to file or file charges. The assistant may then file charges for the same acts, for part of them or for others that do not involve a substantial change to those, even if his accusation is subordinate to that of the public prosecutor - 284th CPP. If at the end of the investigation the public prosecutor does not file charges, but notifies the assistant to do so, this act is null and the nullity in these terms is incurable - 119.º/1/b). This nullity will determine the invalidation of all acts dependent on the null act or that have been affected by it - 222nd CPP. private crimes in the strict sense, whose criminal proceedings depend on private prosecution, such as, for example, articles 188 and 207 of the criminal code, constitute a true exception to the principle of officiality, insofar as it is necessary for the injured party or other persons - 113 and 117 of the criminal code - to complain, constitute themselves as assistants and file a private prosecution - articles 50.º/1, 246.º/4, 68.º/1/b) and no. 2 and 285.º/1 of the criminal code. the constitution as an assistant takes place 10 days after the injured party, or another person who constitutes himself as an assistant in the case,and, have filed a complaint, when made in writing, or have been informed that they must be appointed as an assistant, if the complaint was made orally, in accordance with articles 246.º/4 and 68.º/2 of the cpp . They constitute an exception, on the one hand, because the opening of the investigation by the MP is dependent on the presentation of the complaint by the offended party, or other people, and the appointment of the latter as an assistant and, on the other hand, because it is up to the assistant, in the At the end of the investigation, decide on the deduction of charges - in accordance with the provisions of article 285.º/1 and in accordance with the requirements of 285.º/3 of the cpp. If a particular deduction is presented, the MP will only be able to accuse the same facts, on their part or on others that do not involve a substantial change in those when they do not agree with the assistant's position - articles 50.º/2 and 285.º/4 cpp . without prejudice to the holder of the right to private prosecution being able to withdraw from it until the publication of the first instance sentence, as long as there is no opposition from the accused, who is given the possibility of affirming his innocence before a court - 116. º/2 and 117th of cp and 51st cpp. Why do these deviations from public crimes exist? There are crimes that are not very serious or that, in addition, affect legal interests that are individual and do not have such a strong community resonance. Sometimes the crime is very serious and affects legal interests very intensely, but given the sphere of intimacy to which the crime relates, it is advisable not to conduct the process under penalty of adding to the evil of the crime the evil of the process . one of the main reasons is the attempt to protect the victim from the evil of the process, that is, the evil of the crime could be aggravated if the victim had to continue something they did not want to do. e.g.: sexual crimes against adults. the crime is semi-public because the state understood that it should not promote the criminal process against the will of the individual offended by the crime, as it would be violence to see the process take place against their will, discussing intimate matters and where the victim necessarily has to collaborate to some extent. It is necessary to guarantee a certain autonomy for the victim and respect their wishes. however, the MP can open an investigation, even without a complaint, when it understands that the interest of the specific victim is advised. 113.º/5; 178th/2 cp. The need for procedural economy is also a reason for these deviations to exist. Added to these reasons is the fact that, sometimes, there are crimes that are semi-public, but if committed within a narrow family circle, they become private crimes in the strictest sense. the legislator understands that state interference would lead to a worsening of the conflict, therefore, the issue of resolving the problem is left in the hands of family members, even if this is only in the case of minor crimes (as a rule, property crimes). There is also a probative reason. it is said that the close relatives of the accused have the right to refuse to give a statement, and are not obliged to speak against him- 134th cpp. Therefore, if the MP accused in a situation where the victim himself was not interested in the process, it could be the case that, at a trial hearing, the evidence would not be given because the close relative in question would refuse to give statements.

How do we know the type of crime in question?

• public crime: nothing is said

• semi-public crime: depends on complaint

• private crime in the strict sense: depends on the constitution of an assistant.

Procedure requirements: we are talking about requirements that must be met for a process to exist. the complaint the complaint is a declaration of awareness and will, a declarative act by which the holder of the right to complain expresses his desire for criminal proceedings to be taken against someone for committing a crime. is optional, renounceable and subject to withdrawal, under the terms of article 116 cp. the complaint is distinguished from the denunciation. the latter canIt can be made by any interested party, without prejudice to there being cases in which the complaint is mandatory. There is no deadline for the complaint, and it can be filed at any

time within the limitation period of the criminal proceedings - 118 et seq. of the Criminal Procedure Code. The complaint is a declaration of knowledge, whereas in the complaint there is a declaration of intent that is not limited to bringing to the attention of the Public Prosecutor's Office the occurrence of a crime, but also that criminal proceedings be carried out with regard to the person who committed the crime and the acts committed by him. The complaint regime is provided for in article 113 et seq. of the Criminal Procedure Code. The answer to the legitimacy to file a complaint is given by article 113/1. As a rule, the complaint can be filed by the injured party. The latter is understood as the holder of the interests that the law intended to protect by incriminating a certain conduct. Thus, not everyone who is affected by the commission of a crime is offended. However, there are deviations from this rule, under the terms of article 113.º/2 it is foreseen that the right to complain may be exercised by the family members indicated therein. This article foresees two family classes, with a principle of class preference, with the first taking precedence over the second. Within each class, each of the persons referred to therein may file a complaint without distinction - 115.º/3. As for the complaint period, the rule is 6 months and in certain cases 1 year - 115.º/1 CP. The right to complain is held by the injured party, who is the holder of the legal assets that are especially protected by incrimination. In most cases it is easy to understand who the injured party is, but sometimes it is necessary to interpret the legal type, understanding which legal asset is whose protection is in question and who is the holder of that same asset - for example, if someone commits the crime of breaking and entering, the protected legal asset is the privacy of the person who lives on the site and not necessarily of its owner. In the crime of damage (we saw in the practical class the example of the room in the rented house), for example, the case law of the STJ in ruling 7/2011, came to clarify that not only the owner of the property is considered to be offended, but also the person who exercises a right of use and enjoyment over it, since he will also be entitled to enjoyment of the thing. In multi-offensive crimes, the criminal procedure depends on participation or a private complaint, as is the case of the crime of breach of employee confidentiality - 383.º/3 cp. For example: in the crime of breach of confidentiality by an employee - 383.º - the protected legal asset is the legality of the public administration's actions, having a supra-individual nature. It is, after all, a crime against the State. However, it may also be at stake, for example, the privacy of the person whose secret was revealed, so there may be a private interest that is indirectly affected by the commission of this crime. For this reason, it is accepted that criminal proceedings may depend on a complaint when there is someone who has been offended by the act committed, under the terms of paragraph 3 of article 383 of the criminal code. There are certain organizations that defend community interests and that aim to protect certain diffuse interests and to whom the law may grant legitimacy to file a complaint, in order to protect legal assets with community relevance, for example, copyright. There are crimes in which the initiation of the proceedings depends on the participation of the State: 188.º/1/b); 319.º/2 and 324.º criminal code. If the holder of the right to complain dies without having exercised it, the ownership is transferred to the entities provided for in article 113.º/2 criminal code. As already seen, this article provides for two classes of family members. It only passes to the people in the second class if there is no one who belongs to the first. If any of these people participated in the crime, the legitimacy to exercise the complaint will not be transferred. There are situations in which the holder of the right to complain does not have the capacity to exercise that right.to. there are two situations: incapacity due to minority - the capacity to exercise the right to complain is measured at 16 years of age; natural incapacity - anyone who does not have the natural discernment to understand the meaning and scope of the right to complain. If the offended party is under 16 years of age or does not have sufficient discernment to understand the meaning and scope of the right to complain, the right will belong to the legal representative or, failing that, to the family members indicated in nº2- 113.º/4. As for article 113/5, there is talk of the possibility of the MP initiating criminal proceedings within 6 months of becoming aware of the fact and its perpetrators, whenever the offended party's interest in advising it is lower or not having the discernment to understand the meaning and scope of the right to complain, or because its ownership would belong only to the perpetrator of the crime. of article 113/6 it follows that if the offended party is under 16 years of age and the right to complain is not exercised by the legal representative, the family members indicated in paragraph 2 or if the public prosecutor does not initiate the procedure on its own initiative, the complaint may be presented by the offended party from the date on which he or she turns 16 years old. If criminal proceedings are promoted by the MP without the complaint having been made, the case will be archived, under the terms of article 277/1 cpp. As for the deadline, article 115 of the CP will apply. The deadline for filing a complaint is 6 months from the date on which the offended party became aware of the fact and its perpetrators. In the event of the death of the injured party or in the event of the victim becoming incapacitated during the period, the successors may exercise the right to file a complaint within 6 months from the death of the injured party and, in the case of incapacity, within 6 months. months are counted from the moment she was considered incapable. In the case of minors, when no one files a complaint on their behalf and they want to file a complaint after turning 16, the period is longer, with the deadline for filing the complaint being extinguished, 6 months from the date on which the offended party completes 18 years old, according to 115º/2 cp. These deadlines are substantive, they are not interrupted or suspended. When someone exercises the right to complain, they can exercise it themselves or through a representative, when they are incapable. however, there is still the possibility, even if the holder of the right to complain is capable, of appointing a representative to present the right to complain: a forensic representative - lawyer or solicitor - through a simple power of attorney that gives forensic powers; or a power of attorney with special powers when the person is not a lawyer or solicitor. In this context, the principle of passive indivisibility of the complaint, provided for in article 114 of the CP, is also relevant. if there are several participants in an infraction and

the offended party complains, it is enough for him to file a complaint against one of them for the complaint to be extended to the others - this rule also applies to cases of non-exercise of the right to complain, article 115/3, and withdrawal of complaints, article 116/3 cp. You cannot choose which of the participants you want to initiate criminal proceedings against, excluding the others. This principle aims to prevent arbitrary choice on the part of the offended party. It should be noted that this indivisibility of the passive side, especially in the case of withdrawal of a complaint, does not validate an indivisibility of the active side of the complaint, that is, if there are several people offended by the commission of a crime, the withdrawal of a complaint by one of them does not forces others to give up too. The right to complain is an available right and, therefore, there may be a waiver or withdrawal of complaints: i. renunciation - this can be express or tacit. an important case of tacit resignation is that of 72º/2 cpp. The law understands that there is a tacit waiver of the right to complain when, for example, the offended party previously files a separate civil action in accordance with that article.