# Analysis of Some Structuring Principles in Administrative Offenses Law

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*Historically, the Administrative Offenses Law has its genesis and development in Germany, whose evolution took place after the Second World War, with the German legal and penal system influencing the construction of the current model of Portuguese administrative law. In Portugal, Decree-Law No. 232/1979 introduces into the legal system the regime of administrative offenses, but Decree-Law No. 433/82, of October 27, which through its art. 96 revoked Decree-Law No. 232/1979 and introduced the General Regime of Administrative Offenses (RGCO) and its process in a stable manner. The right of mere ordination is criminal law in a broad sense, so that it justifies the subsidiary application of Criminal Law in cases not covered by the General Regime of Administrative Offenses (RGCO), if the penal rules do not contradict the principles contained in the administrative offenses. Taking into account the structuring principles of the Administrative Offenses Law, the research seeks to analyze some constitutional principles structuring of Criminal Law that are also common to the Administrative Offenses Law, such as the principles of proportionality, guilt and legality. As a result, research has shown that such principles have greater flexibility in the application of this right because the deprivation of people's freedom is not at stake in Administrative Offense Law intervention.*

*Keywords: law, Administrative Offenses Law, principles*

## INTRODUCTION

The theoretical foundations of the Administrative Offenses Law date back to the 18th century in terms of remote background, thus involving a set of historical-philosophical and historical-political factors. In this period of the absolutist State, there was a reorganization of the State and the Law resulting in a (1) "police magisterium", which is organized around behaviors that constitute disturbances of peace and public order, so that they are offenses also known as political crimes; and a (2) "criminal magisterium", which deals with behaviors whose disvalue results from an aggression against the foundations of society and has a contractual nature. At that time, police power was institutionalized in a huge administrative pyramid in which the king was at the top, so the police were responsive only to the king and his inspections (Dias, 2018, p.10).

Even in the eighteenth century, with the draft Criminal Code, the criminal frameworks applicable to political offenses appear, so that offenses to the government rules of the polis of an administrative nature

were created with their own bases whose autonomous administrative jurisdiction was responsible for assessing and judging these offenses (Dias, 2018, p. 11).

During the 19th century, the period in which the liberal rule of law and the jurisdictionalization of contraventions emerged, there was already an attempt to fight the idea that there were state powers above the law supported by the principle of division of powers based on the principles of subordination of all administrative activity to the law and the jurisdictionalization of all measures restricting rights and freedoms (Dias, 2018, p. 11).

At that time, police offenses became part of the list of criminal offenses and were referred to as contraventions under the influence of Napoleon's Penal Code of 1810. Police offenses were nothing more than so-called contraventions. The jurisdictionalization of contraventions was accompanied by their inclusion in penal codes, so that in the Portuguese criminal legal system most contraventions were provided for in separate criminal legislation (Dias, 2018, p. 13).

By the beginning of the 20th century, Portuguese doctrine showed a concern focused on the litigation's dogmatic nature. Henrique da Silva states that the typical danger of the contravention is neither certain nor probable but presumed by the legislator. The author goes beyond systematic questions concerning the place of contraventions in criminal law, criticizing the Portuguese Criminal Code, also influencing other authors, such as Beleza dos Santos and Eduardo Correia who explored the issue at the level of consequences and criminal law reform (apud Dias, 2018, p. 16).

Regarding the closest background, in the period between the two world wars, there was a growing intervention of the State in the economic activity in which legal duties were created whose violation would give rise to a crime or contravention. The theory of Administrative Criminal Law, the foundations of which were laid by Eberhard Goldschmidt and Max E. Mayer. The purpose of this theory was the legislative reform and the establishment of a sanctioning system independent of Criminal Law, so that the distinction between criminal and non-criminal matters was imposed, and the legal definition of a specific punitive regime. In Goldschmidt's theory he divided as types of offenses (1) crimes or legal crimes and (2) administrative offenses (*Ordnungswidrigkeit*), classifying his division into criminal offenses and administrative offenses that poured into the law of anti-economic offenses (Dias, 2018, p. 17-20).

The Law on the Simplification of Economic Criminal Law dated July 26, 1949 accepted the *Ordnungswidrigkeit*, but did not contain the legal regime for the new type of offenses, so this gap was filled by the Administrative Offenses Law dated March 25, 1952. This first law allows the extension of the new offenses to other areas of social activity and the continuation of the political-criminal program of purification of criminal law of only administrative offenses (Dias, 2018, p. 20).

Consequently, a new branch of law was born - Administrative Offenses Law - whose discussion on its fundamental pillars persisted until the issuance of the Law of May 28, 1968 (OWIG), whereby "the figure of the administrative offense (*Ordnungswidrigkeitengesetz*) was defined as objectionable (*Vorwerfbarkeit*)" (Pereira, 2015, p. 33). The OIWIG replaced the previous one in order to simplify the offense administrative procedure, creating links and possibilities of connection with the criminal procedure, while at the substantive level it eliminated the figure of mixed types accepted by the previous law and incorporated rules of the StGB in the general part.

The evolution of legislative reform in Administrative Offenses Law in Germany reveals an increasing approximation to the Criminal Code regime (Dias, 2018, p. 21). Historically, Germany was the area of origin and development of the law of mere social order, whose evolution occurred in the post-World War II period (Brandão, 2013, p. 18), so that this legal-criminal order influenced Portuguese law in the construction of its current model of Administrative Offense Law (Vilela, 2013b, p. 11), crowning the theorization of the subject matter of the so-called administrative criminal law (Pereira, 2018, p. 19-20).

Following with the historical evolution, it is important to remember that Portugal did not enter directly into the Second World War, which justifies that the Portuguese legal system did not know such an early and accentuated development of the Administrative Criminal Law in this stage. However, the Estado Novo produced a complex criminal legislation of independent character due to the increasing intervention in economic and social life (Dias, 2018, p. 22).

The origin of Decree-Law No. 41.204 dated July 24, 1957, which dealt with offenses against public health and economic order, demonstrates the concern to systematically codify and order economic offenses, so that failure to comply with rules and guidelines implied disciplinary offenses. These offenses were also contemplated in Decree-Law No. 48.547 dated August 27, 1968, which regulated the exercise of the pharmaceutical activity. The corporate disciplinary offenses and penalties in the aforementioned statutes were in line with the operation of a business economy (Dias, 2018, p. 22-25). Alexandra Viela states that in the Portuguese legal system, when the legislator intends to create offenses for specific areas, such as the environmental, IT, health, competition regulation, he/she resorts to both criminal offenses and those of simple social order (Vilela, 2013a, p. 3). Moreover, these statutes can be considered as an embryo of the administrative offenses emerged in the Portuguese legal system (Dias, 2018, p. 22-25).

Subsequently, Eduardo Correia made an extraordinary contribution to the entire subsequent evolution of Portuguese Criminal Law by setting the basis of what today is the Administrative Offenses Law, so that he distinguished the crime and the administrative offense by listing as essential points (1) the structure of the offense, (2) the definition of guilt, (3) the nature of the sanction and (4) the procedural and punitive competence (Brandão, 2013, p. 134), taking into account its important role in the preparatory work for the Draft of a new Criminal Code.

On July 24, 1979, Decree-Law No. 232 was published, which introduced the regime of administrative offenses into the Portuguese legal system. The reasons stated in No. 1 of the preamble indicate the need to adopt a mere law of social order within the Portuguese legal system, so that the lack is justified by the need for an alternative sanctioning system, distinct from criminal law. However, the lack of constitutionality of Decree-Law No. 232 was raised as to the lack of competence of the Government to decriminalize contraventions, according to art. 1, No. 3 and No. 4, later repealed by Decree-Law 411-A/79.

Following this development, Decree-Law No. 433/1982, dated October 27, 1982, was published, which, through its art. No. 96 revoked Decree-Law No. 232/1979 and introduced the General Regime of Administrative Offenses (RGCO) and its process in a stable manner. In Portugal, therefore, the illicit of mere social order was first instituted in the Constitution of the Portuguese Republic (CRP) and subsequently by this statute (VILELA, 2013b, p. 352). In addition, it prevailed in the Portuguese legal system, for almost two and a half decades, the crimes, administrative offenses and contraventions regulated, respectively, by the Criminal Code of 1982, Decree-Law No. 433/82 and the Criminal Code of 1886 (DIAS, 2018, p. 30).

The rules on contraventions remained in force when they were dealt with by Decree-Law No. 17/91, so that this statute retained the matrix of contraventions that distinguishes it from the classic forms of administrative offenses: the connection of criminal law and criminal procedure as subsidiary law. It concludes, therefore, an important stage in the implementation of the offense of mere ordinance in Portugal (Dias, 2018, p. 30) which, for Augusto Silva Dias, the legal-administrative influence, rather than the legal-criminal one, is more evident in the establishment of the typical crime of administrative offenses one (Dias, 2018, p. 44).

Looking back to Decree-Law No. 433/82, some changes in the aforementioned statute moved towards bringing the regime of administrative offenses closer to the principles and categorical frameworks of Criminal Law, i.e. the creation of a "second pase" Criminal Law, a thesis put forward by Silva Sánchez, in the Spanish legal system (Vilela, 2013b, p. 24). In this evolutionary path, in Portugal, the Administrative Offenses Law has progressively become the sanctioning instrument par excellence of the regulatory State, so that a model arrives in Portugal which, in the field of administrative offenses, involves the existence of a RGCO and sectoral regimes of administrative offenses (labor, tax and social security offenses, among others) of which the former functions, as a general rule, as subsidiary legislation (Pereira, 2015, p. 6).

The normative and social reality of the time led some authors to propose the distinction of legal regimes between "modern" and "traditional" administrative offenses (Dias, 2018, p. 32-34). It is this division that supports the need to revise the Administrative Offenses Law to create a "two-phases" punitive and procedural regime based on the RGCO (Dias, 2018, p. 35).

In this sense, Alexandra Vilela considers that there are reasons to distinguish between administrative offenses with social ethical content and "social order" offenses, devoid of such content (Vilela, 2013b, p. 307 et seq.), and therefore provides proposals for the reform of the current Administrative Offenses Law.

On this issue, Silva Dias understands that "the distinction between offenses of mere ordinance and administrative offenses with social ethical content is not sufficiently specific and certain to understand in each case to which punitive regime a given offense should be subjected" (Dias, 2018, p. 37).

In any case, it should be noted that the territory of administrative offenses is marked by dysfunctional behavior. The distinction between administrative offenses has to be found within this territory, turning to criteria such as the social relevance of the interest of order and cause, the disturbance degree that the behavior causes to the promotion of that interest, and the unnecessary or inconvenient subjection of the behavior to a more rigorous and formal legal regime, that is, closer to the principles and rules of Criminal Law and Criminal Procedural Law (Dias, 2018, p. 41).

Concerning the location of the Administrative Offenses Law within the legal system, material and historical reasons indicate that it is a branch of Public Law, previously treated as a "bastard" (Goldschimdt) of Criminal Law and Administrative Law, whose nature of the offense is administrative while fitting in this area some principles and guarantees of defense typical of Criminal Law.

The formal definition of administrative offense is presented by Article 1 of Decree-Law 433/82 as "any unlawful and reprehensible fact that complies with a legal type in which a fine is imposed" and the Criminal Code also brings it when dealing with the offense according to the principle of legality. It should be noted that the requirement that the wrongful act be reproachable is based on the principle of *nulla poena sine culpa* (Pereira, 2018, p. 24), a principle with provision in art. 8 of the RGCO and in the Criminal Code.

Alexandra Vilela teaches that an administrative offense is any unlawful, typical and reprehensible fact that either violates the administrative duty, or breaches a rule that protects or promotes social welfare, besides being also any offense that aims to protect legal property with criminal dignity, although it is not necessary to apply the penalty (imprisonment and penalty), but the law imposes a fine, which, incidentally, is the only main sanction of the crime of mere social order (Vilela, 2013a, p.1). Therefore, the fine, different from the sanction is a "financial penalty" (Pereira, 2018, p.23) proper to the administrative offenses law, which restricts property rights and economic freedoms.

The doctrine has debated the question regarding the distinction between crime and administrative offense (Pereira, 2018, p. 21 et seq; Dias, 2018, p. 45 et seq.), thus listing among the positions (1) the one that considers that there is no more than a quantitative or gravity difference between both forms of offenses, (2) the one that defends the existence between both offenses of a material or qualitative difference, and (3) the one that argues for the mixed theory, qualitative-quantitative, since the answer varies depending on the term of comparison in which it is constituted by the central criminal law or the secondary criminal law.

Faria Costa teaches that "Between criminal law and the law of mere social order intercedes a qualitative and not merely quantitative difference" (Costa, 2017, p. 35), concluding that criminal law lives and is structured by crime and penalty, while the law of mere order is built through administrative offense and fine. Therefore, the literal meaning of art. 1 of the RGCO is already sufficient, which makes clear the structure to be defended for the law of mere social order, taking into account the dogmatic category of the administrative offense and the sanctioning category represented by the fine (Costa, 2017, p. 36).

Alexandra Vilela understands the offense of mere ordination as belonging to the science of total or joint criminal law, thus following Faria Costa (Vilela, 2013a, p. 4). In her work, followed by Figueiredo Dias, the author refers that "it is incomprehensible to accept that quantity, once it has reached a certain degree, is transfigured into quality" (Dias, 1983, p. 330), concluding that the law of mere social arrangement belongs to Criminal Law and lives an intense relationship with secondary criminal law (Vilela, 2013b, p. 211;12). Ana Maria Pereira shares the same reasoning as Faria Costa in stating that "adherence to a mixed quantitative-qualitative criterion, effectively, differentiation is made through a qualitative criterion" (Pereira, 2013, p. 28-29).

In short, Beça Pereira teaches that Administrative Offense Law is a sanctioning public law (see Dias, 2018, p. 15; Albuquerque, 2011, p. 29) and is now a branch of secondary criminal law (see Dias, 1889/1990, p. 22; Costa, 2017, p. 22; Vilela, 2013b, p. 243 et seq.) "with a connection" (Albuquerque, 2011, p. 29) pursuant to the legal assets it protects, the principles on which it is based, the social relevance conferred by the legislator, the law it appeals subsidiarily and by the weight of some of the fines and accessory penalties it provides for (Pereira, 2018, p. 22).

It cannot fail to note the autonomy of the substantive administrative offenses law in relation to criminal law regarding the fact that the extinction of criminal liability arising from the payment of taxes does not include the administrative offenses (Albuquerque, 2011, p. 29).

Alexandra Vilela states that the Criminal Code, under the terms of Article 32 of the RGCO, applies subsidiarily to substantive issues not resolved by its general regime, the principles of legality and typicality (Article 2), of non-retroactivity of the law (Articles 5 and 3, No. 2), territoriality in the strict sense (articles 4 and 6), unlimited liability of legal persons, while the procedural configuration of administrative offenses is provided for between articles 33 to 58, of the RGCO (Vilela, 2013a, p. 4).

For the purposes of compliance with the European Convention on Human Rights (ECHR), administrative offenses may constitute criminal matters and the guarantees of the ECHR apply to the law and procedure of administrative offense. Furthermore, it is important to point out that the preamble of Decree-Law 433/82, in its number 2, deals with the urgency of making social order law effective as a distinct and autonomous branch of criminal law due to the transformations that have taken place in the Portuguese legal system, especially the legal and constitutional framework that recognizes and structures administrative offenses law according to constitutional principles, such as the principles of legality, proportionality and guilt, which structure the administrative offenses law.

## FUNCTIONS OF PRINCIPLES WITH CONSTITUTIONAL STATUS AND DISTINCTION BETWEEN NORM-PRINCIPLE AND NORM-RULE

First of all, it is necessary to understand the definition of the term "principles", for which Aristotle found several meanings to define it, namely: the starting point of the movement of a thing; the best beginning; the first and inherent element of generation, that from which a process of knowledge starts (premises) (*apud* Peixinho, 2000, p. 101-102).

The distinction between norm-rule and norm-principle "constitutes the basis of fundamental right reasoning" (Alexy, 1993, p. 81 et seq.). This differentiation is provided by Robert Alexy in a way that points out a distinction between rules and principles in comparison with Ronald Dworkin's hermeneutics. While according to Dworkin the rules are the positive legal norms of legal texts (Constitution, laws, precedents) and the principles are the principles of political morality that justify the rules, according to Alexy both rules and principles are a matter of positivity. In addition, German constitutional theory adopts as one of the criteria the generality degree of the rule, which means that the more generic the rule is, the more similar to a principle it is (Alexy, 1993, p. 82).

Ivo Dantas defines the principle as a "[...] logical and, as far as possible, universal category, although we cannot forget that [...] it reflects the ideological structure of the State itself, as such, representative of the values enshrined by a given society" (Dantas, 1995, p. 59). In this regard, the principles represent the basic and fundamental commandments of a system; they are the fundamental basis of the normative order with respect to the legal field, so that they act as guiding criteria to direct the development and application of other legal norms.

Concerning the legal nature of legal principles, a somewhat controversial issue, the idea prevails that they are a type of legal norms, since, according to the post-positivist current, they are the cornerstone of the constitutional system with a normative and binding character in the resolution of concrete problems. Furthermore, it should be noted that legal principles are legal norms hierarchically superior to legal rules, for which reason the latter cannot contradict them, under penalty of jeopardizing both the logic and the rationality of the normative system.

Based on the above, it is worth highlighting some structural principles of Criminal Law - proportionality, guilt and legality- which are common to the Administrative Offenses Law, whose characteristic of application in this Law is endowed with flexibility by virtue of the fact that the intervention of administrative offenses does not imply the deprivation of liberty. Therefore, the normative impact of these principles can vary according to the direct reason for the type and extent of the restriction of rights deriving from the typical forms of intervention of these principles in the field of law. Furthermore, the issue of flexibility and adequacy of constitutional principles is a subject debated in the Constitutional Court (see

judgments ns. 659/2005 and 461/2011), thus recognizing the flexibility need for them when they are applicable to the Administrative Offenses Law (Dias, 2018, p. 57).

These principles help to shape the penalty system for administrative offenses and play an important interpretative and coercive role. In this connection, it is worth highlighting the provisions of Article 18, No. 1 of the Constitution of the Portuguese Republic ("1. The constitutional precepts relating to rights, freedoms and guarantees are directly applicable and binding on public and private entities"), whose content integrates the substance of the specific constitutional regime of rights, freedoms and guarantees, so that the precept implies the normative force and limits of the Constitution's relevance in the context of the overall legal system (Canotilho; Moreira, 1993, p. 144).

Regarding the guarantee sense of the principles of proportionality and guilt, "they are directly applicable and binding on public and private entities" since they force and reveal in the exercise of the sanctioning power, at the time of the interpretation and concrete application of the rules of administrative offenses (Dias, 2018, p. 57-58), which means to say that these normative rules must be in line with the respective principles, considering, especially the flexibility they contract in the Administrative Offenses Law.

## THE PRINCIPLE OF PROPORTIONALITY

Complementary Law No. 1/82 provided express constitutional protection to the principle of proportionality (art. 18, No. 2, 2nd part, CRP), but previously, even in the absence of an express text, it was considered a material principle inherent to the system of rights, freedoms and guarantees (CanotilhO; MOREIRA, 1993, p. 151).

Taking into account that fines restrict economic and patrimonial freedom, the principle of proportionality must be respected in the imposition and application of fines considering the seriousness of the offenses, enshrined in Article 18, No. 2 of the Constitution of the Portuguese Republic.

By analyzing the constitutional provision, Gomes Canotilho states that the system of constitutional rights, freedoms and guarantees does not prohibit in any way the probability of restriction by law of the exercise of these rights, freedoms and guarantees. These restrictions, however, are subject to some strict requirements, so this restriction will be constitutionally legitimate in cases where it respects some conditions. The first of these concerns the express provision of the Constitution that admits this restriction (No. 2, part 1). The second condition is that the restriction is intended to safeguard another constitutionally protected right or interest (No. 2). The third condition is that the restriction must be required by that safeguard and be limited to the extent necessary to achieve that purpose (No. 2, second part). Finally, the condition that the restriction does not terminate the right in question by reaching the essence of the corresponding norm (No. 3). It should be noted that these conditions are cumulative requirements (Canotilho; Moreira, 1993, p. 148-149).

According to constitutional doctrine, the principle of proportionality is broken down into the following corollaries regarding the subjection of restrictive laws: principle of enforceability, principle of necessity, principle of adequacy and principle of proportionality in the strict sense (Canotilho; Moreira, 1993, p. 140 et seq; Miranda; Medeiros, 2010, p. 41 et seq).

Augusto Dias notes that the principle of proportionality in the strict sense assumes a sublime relevance in terms of the correspondence between the seriousness of the offenses and the severity of the fines, so the scale of criteria in the application of sanctions must be attended to, i.e., the most serious sanctions are applied to the most serious administrative offenses, the less serious to the most minor administrative offenses, and so on (Dias, 2018, p. 58).

He also states that the proportionality requirement does not seem to be complied with by the Portuguese Competition Law since the legislator did not establish a fine for each type of administrative offense. Even though the legislator has a wide margin of choice in setting the number of fines, proportionality requires that the seriousness of the offense and the guilt of each of them be taken into account, so that disproportionality of the penalties must be avoided.

## THE PRINCIPLE OF GUILT

In preliminary lines it should be noted that guilt, as a legal principle, finds its constitutional basis in the very value of human dignity, which already infers that any probability of basing guilt from the perspective of prevention is or should already be preliminarily ruled out (Costa, 2015, p. 327).

Crespo Pereira recalls, from the perspective of administrative offenses in the German legal system, that German authors such as Heliana Maria de Azevedo Coutinho said that "the agent does not act willfully or culpably (*Schuldhaft*) only deserves social censure by means of a fine (*Geldbusse*) for having acted contrary to his/her duties as a citizen of a welfare state" (Pereira, 2015, p. 33).

In the Portuguese legal system, it is also a basic principle of the Criminal Code, as it is in the Administrative Offenses Law. The RGCO, still in the version of Decree-Law No. 232/79, established that "the law shall determine the cases in which an administrative offense may be imputed regardless of the objective nature of the act" (art. 1, No. 2) and complemented that in these cases there would be no imputation of willful misconduct and negligence (art. 8, No. 1). In this sense, liability for fault was admitted in the total absence of the principle of guilt. Decree-Law No. 433/82 partially amended this regime by eliminating the reservation in the initial part of Article 8.1, in order to establish the principle of guilt in its subjective imputation dimension. This scenario was modified by Decree-Law No. 244/95 as it ordered "eliminating the possibility of sanctioning administrative offenses regardless of the reproachable nature of the fact", which made the principle of guilt fully effective in the Administrative Offenses Law (Dias, 2018, p. 63-64).

Taking into account that Decree-Law No. 232/79 did not set forth any qualitative or quantitative criteria to determine which administrative offenses could be sanctioned even in the absence of a fault, the matter was left to the decision of the legislator. Therefore, this statute, if it had been kept in force, would have contributed to the fact that other sectors of "modern" administrative offenses are now based on liability without fault. It should be noted that the Competition Law does not contain a closed list of factors for determining the amount of the fine and does not include guilt among the criteria mentioned therein.

Faria Costa states that the principle of guilt reveals the idea of individual reproach and whose notion of guilt is deployed within the framework of the guiding principle of criminal policy, on the plane of the regulatory idea and on the horizon of mere concrete censure (Costa, 2015, p. 329). Beça Pereira states that the guilt, in the tort of mere ordination, results in the imputation of the fact to the social responsibility of the agent, which occurs differently in the criminal offense, in which it is based on the ethical censure of the agent (Pereira, 2018, p. 57).

In administrative offenses law, therefore, it is inferred that the meaning of the principle of guilt results from a breakdown of this principle into subjective imputation, censure of guilt and fine measurement criterion, segments applicable with greater dogmatic and evidentiary flexibility in this law when compared to its application in Criminal Law (Dias, 2018, p. 64-65). This is due to the fact that criminal justice is a value that is measured by results and in this context the principle of guilt "[...] boasts the autonomy of the normative, it is structured in the multifaceted complexity of the dialogue it carries out with the real-problematic of Criminal Law" and also "is fulfilled in the productive practice of the achievement of the historically situated justice" (Costa, 2015, p. 330).

Regarding the flexibility of this principle in the Administrative Offenses Law in comparison with the Criminal Law, it is due to the circumstance that the Offenses Law is constituted by the social role. This role provides the care standard whose compliance represents the disvalue of the action when it comes to the plane of subjective imputation, particularly in negligence, while in the level of guilt, the censure is the defective role of the function, in other words, the deviation regarding the standard procedure in the sector of the activity in question (Dias, 2018, p. 64-65).

On the other hand, the measure of the guilt of the administrative offense, in comparison with the criminal guilt in the measure of the penalty, does not have such a marked and decisive weight in the measure of the fine. Crespo Pereira states that it is increasingly difficult to compare fines with penalties, as both share the attribute of patrimoniality (see Art. 47 of the Criminal Code and Art. 17 of the RGCO) and both

are enforced by the State through the courts and administrative bodies and, more recently, by regulatory agencies that are, however, supervised by the State (Pereira, 2015, p. 36).

Augusto Dias states that the doctrine, therefore, has recognized that the function of the fine, in contrast to the penalty, is to absorb the economic and derived advantages of the offense, although it is not an exclusive and unlimited function (Dias, 2018, p. 66).

According to the reform of the RGCO promoted by Law No. 13/95, it was intended to raise the limit of the fines up to the amount of the economic benefit "without such increase exceeding one third of the legally established limit", in accordance with the wording of article 3, paragraph d, of DL No. 433/82. Currently, this maximum limit appears in Article 18, No. 2, of the same statute. Given that guilt does not define the upper limit of the fine in isolation, unlike what happens in criminal liability, it is also true that it presses to set the fine at a lower measure than that resulting from the weighing of factors such as economic benefits and the need for general prevention when it points in the opposite direction (Dias, 2018, p. 66). The guilt has a certain scope in the amount of the fine and the possibility of determining its mitigation is provided for in art. 18, No. 3 of the RGCO.

The issue of fixed fines reached the courts, so that in the Constitutional Court the jurisprudence began to recognize the validity of the principle of guilt in the Administrative Offenses Law. The dominant approach established an understanding, in relation to the principle of guilt, admitting a "different gradation of its imposing force in this sanctioning area" (judgment No. 481/2010), thus defending the non-transposition to the area of fines of the reasons that support the unconstitutionality of the imposition of fixed penalties. The provision of fixed fines may be vitiated of unconstitutionality due to violation of the principle of guilt in cases where the administrative offenses are not committed on a massive scale (Dias, 2018, pp. 66-67). Regarding the judicial courts, the understanding established in the Court of Porto (judgment of February 3, 2011) is that Article 27.1 of DL 399-F/84 is an unconstitutional norm with regard to the fixed fine established, as it violates the constitutional principles of guilt, equality, legality and proportionality (Dias 2018, p. 67).

Also at the court level, the principle of guilt was recognized by the Court of Appeal of Coimbra (judgment 529/2008) as a basic principle of the administrative offenses law. The firm understanding requires that it be imputed by way of willful intent or negligence in the commission of the act for there to be culpability on the agent's side. According to the meaning of the terms, willful intent constitutes the practice of the fact described in the administrative offenses law while negligence is characterized by the lack of attention and, therefore, violates a duty of care (Pereira, 2018, p. 58).

Therefore, *nullum crimen sine culpa* demonstrates an extraordinary conquest from the civilizing point of view by overcoming the model of strict liability, in such a way that it implies an evident rationalization and humanization of *ius puniendi.* Therefore, its scope only extends to the imposition of a sanction.

## PRINCIPLE OF LEGALITY

The principle of legality contained in the Constitution of the Portuguese Republic establishes that "1. No one can be criminally convicted except by virtue of a prior law declaring the act or omission as punishable, nor can anyone be subjected to a security measure whose requirements are not established in a prior law" (art. 29, No. 1 of the CRP). In the substantive administrative offenses law, Decree-Law 433/82 stipulates that "Only the act described and declared punishable by a law prior to the time of its perpetration shall be sanctioned as an administrative offense" (art. 2), while in procedural law "The procedure for administrative offenses shall obey the principle of legality" (art. 43, RGCO).

The application of the principle of legality to the administrative offenses law follows directly from the principle of legal certainty, as can be seen from a pronouncement of the Constitutional Court in a case involving a disciplinary offense (Judgment No. 666/1994). According to it, the rule of typicality of offenses, a corollary of the constitutional principle of legality, does not apply to this law as it does to criminal law. This is because the requirements of the criminal nature are felt to a lesser extent in the other branches of public sanctioning law (DIAS, 2018, p. 67-68).

Gomes Canotilho states that the provision of the Constitution contains the substance of the constitutional regime of criminal law when it states that “an action or omission is criminally punishable” (art. 29, No. 1, CRP), since the definition of a given crime includes, consequently, the provision of its respective penalty, since “there is no crime without penalty, nor criminal penalty without crime”. The Constitution, in addition, determines that “[...] there should only be criminal sanctions when they are necessary to protect these constitutional assets” (Canotilho; Moreira, 1993, p. 191).

In the same way that it is applied under the theory of criminal law, the principle of legality of administrative offenses is deployed in four corollaries and which find acceptance in the administrative offenses law and from which are derived the requirements (1) of written law, (2) of strict law, (3) of certain law and (4) of prior law (Dias, 2018, p. 68).

**The Requirement of the Written Law and the Problem of the Legal Reserve**

The purpose of the written law ultimatum is to prevent jurisprudence, customs and social uses from being sources for the creation of administrative offenses, as well as for the creation or aggravation of fines or accessory penalties. However, singular administrative offenses and their sanctions are not constitutionally limited to the reservation of law, unlike crimes and penalties, since this reservation covers only the General Regime of the Constitution (see Art. 165, no. 1, section d, CRP) (Dias, 2018, p. 68).

In the Administrative Offenses Law, as opposed to what applies to Criminal Law, the principle of legality provides greater flexibility in the matter of normative sources. This is supported by the provision of the old contraventions in which the penalty was only a fine (see 486 of the Criminal Code/1886). What could be stated as an opposition to this solution if we take into consideration that the creation of administrative offenses produces a restriction of rights, freedoms and guarantees that should have the character of a formal law (see Art. 18, No. 3, CRP: “3. Laws restricting rights, freedoms and guarantees must be of a general and abstract nature and may not have retroactive effect or reduce the extension and scope of the essential content of constitutional precepts”).

Gomes Canotilho states that one of the requirements for the legitimacy of laws restricting rights, freedoms and guarantees is “their general and abstract nature” (No. 3, Part 1). It is not satisfied for laws to be formally or apparently general and abstract, but they must possess the traditional characteristics of law, so that modern forms of law (laws of measures, laws of plans, laws of groups, not to mention laws of administrative acts), which however are not constitutionally prohibited in other areas, have no place in this area (Canotilho; Moreira, 1993, p. 151).

Regarding the problem of the reservation of law, it is an important requirement for the constitutional legitimacy of restrictions to rights, freedoms and guarantees, taking into consideration the double meaning of the reservation of law (material and formal). The reservation of material law means that rights, freedoms and guarantees can only be restricted (or regulated) by law and never by regulation. This includes the fact that the law cannot delegate to a regulation or defer to it any aspect of this regime. The reservation of formal law means that rights, freedoms and guarantees can only be regulated by a law of the Assembly of the Republic or, in the terms of Art. 168, by a duly authorized decree-law of the Government, there being constitutionally provided cases (see Art. 167) in which there is not even the possibility of such delegation (Canotilho; Moreira, 1993, p. 153).

Silva Dias interprets art. 18, No. 3, of the CRP in conjunction with other constitutional provisions, specifically art. 165, No., section d, which extends “[...] to the creation of singular administrative offenses a requirement that the fundamental law reserves for amendments to the RGCO”, completing that “[...] only these should be the subject of formal law” (Dias, 2018, p. 69). At the specific level, Silva Dias does not consider unconstitutional the precepts of the Solid Waste Regulation of Lisbon city for violation of the principle of formal reservation of law, among others mentioned by him, which provide for misdemeanors and fines (Dias, 2018, p. 70). Alexandra Vilela concludes this reasoning, concerning the subjection to the reservation of law in a formal sense in administrative offenses, by stating that paragraph 3 should not be interpreted in isolation from Article 18 as a whole, since the principle of proportionality applies here in terms of the formalization requirements of the law and the variation in direct proportion to the severity of the fines and accessory penalties imposed (Vilela, 2013b, p. 70).

Silvia Dias' findings concerning the variation in the direct relationship of the severity of the fines and accessory sanctions committed indicate in the sense that the so-called "modern" offenses sanctioned with high fines and more severe accessory sanctions are subject to the reservation of formal law, while "traditional" offenses, such as household waste offenses by municipalities, may be contained in regulations of the City Council (Dias, 2018, p. 70).

Gomes Canotilho describes as specific aspects of the principle of legality, first of all, the reservation of law by the Assembly of the Republic in matters of crimes, penalties, security measures and their assumptions, so that the Government can only legislate on these matters with the authorization of the Assembly of the Republic (art. 168, No. 1, c, CRP). He also highlights the prohibition of the normative intervention of the regulations, since the law cannot attribute such competence to them. Finally, the exclusion of customary law as a source for defining crimes or criminal sanctions (Canotilho, 1993, p. 192).

Although they do not constitute a direct source of administrative offenses, nor do customs and usages, jurisprudence and its currents set the meaning of the law and coordinate its application, but the definition of the terms and limits to the exercise of activities considered socially inappropriate corresponds to the legislator, for example, when there are reasons of public interest that justify the adoption of measures to reduce the scope of the prohibition to certain traditions or cultural practices.

## The Requirement of a Certain Law and the Limits of Legal Uncertainty

The principle of legality (art. 29, No. 1 of the CRP) has as its corollaries the principles of *lex certa, praevia* and *stricta*, but both the RGCO and the CRP are silent about the aspects of the certainty of the law (which means the requirement of typicality of administrative offenses) and of strict law (which means the prohibition of analogy). In this regard, Gomes Canotilho made some remarks when commenting on Article 29, No. 1, of the CRP:

> The principle of typicality includes the following requirements: a) the sufficient specification of the nature of the crime (or of the conditions of the security measures), since vague and uncertain definitions that cannot be defined are illegal; b) the prohibition of analogy in the definition of crimes (or of the conditions of the security measures); c) the requirement to determine the type of penalty applicable to each crime, since this connection must be derived directly from the law. The principle of typicality excludes both vague formulas in the description of the legal types of crimes and undefined penalties or so broad as to lead to this situation (Canotilho, 1993, p. 192). Commentary to article 29, No. 1.

In legal theory, Figueiredo Dias has already stated that "the same guarantees constitutionally granted to Criminal Law apply to the Administrative Offenses Law, especially those resulting from the principles of legality and the applicability of the most favorable law". The prohibition of analogical application *in malam partem* and the requirement of typicality and consequent determinability" (Dias, 1983, p. 330) should also be promoted in the Administrative Offenses Law.

The requirement of certain law aims to avoid the use of extremely indefinite concepts or vague techniques, which may expand the space of appreciation, allowing the annulment of the link of the executor with the law (Dias, 2018, p. 77). With respect to the limits of legal uncertainty, Nuno Brandão states that "in immediate consonance with the requirement of determinability resulting from the constitutional principle of criminal legality (art. 29, No. 1 of the CRP), it is only admissible to hold a person responsible for an administrative offense on the basis of a sufficiently determined normative act (arts. 1 and 2 of the RGCO)" (Brandão, 2013, p. 797).

In the Constitutional Court, judgment No. 41/2004 ruled for the inapplicability of art. 29, thus affirming the principle of the Rule of Law as a direct and immediate source of the "constitutional thought that the public sanctioning law, as a relevant restriction of fundamental rights, participates in the essential guarantees explicitly enshrined for criminal law, that is, in the core of guarantees relating to the security, certainty, confidence and predictability of the citizens" (judgment 41/2004).

From this perspective initiated by judgment 41/2004 culminated the position that it is a mistake to pretend to extend to the administrative offenses law the normative projections of the principle of legality of sanctions provided for in article 29, 1, 3 and 4, of the CRP, being "thus quite certain that the requirement of determinability of the predominant type in criminal law does not operate in the field of administrative offenses" (judgment 41/2004) (Brandão, 2013, p. 800-801).

Pinto de Albuquerque, however, states that art. 29 of the CRP cannot be excluded from the area of administrative offenses, because the guarantee endowed with supralegal normative force constituted by the principle of legality accepted by art. 7 of the CEDH (see Albuquerque, art. 1, No. m. 10.)

It should be noted that the prohibition, especially of concepts with a high degree of uncertainty or vague techniques, is less rigorous and less far-reaching with respect to administrative offenses compared to criminal law, which is applied in situations of extreme uncertainty. This prohibition, therefore, applies to globally permissive and successively permissive blanket laws (Dias, 2018, p. 71-72).

The principle of legality determines that a blank law must make, in a minimally clear and objective form, the internal or external reference to the legal or regulatory statute in question.

In this regard, the Constitutional Court has agreed that "the law of mere social order can be adapted to the essential requirements of criminal law, i.e., derived criminal law, when there is a reference to technical norms". The same judgment also ruled that "[...] a mandatory provision cannot be devoid of guidance as to the behavior of those to whom it is addressed" (judgment 41/2004). In this sense, Silva Dias agrees by arguing that only in this way can there be "a connection between foresight and typical statute that is informative for the set of addressees and perceptible for the executor", considering that it is an irrevocable determination of the principle of legality, regardless of its flexibility (Dias, 2018, p. 73).

The principle of legality is also infringed in relation to successive blanket laws, given the path that encompasses a series of legal or regulatory provisions, regardless of whether the provision is found in the same or in different statutes.

The Constitutional Court has discussed the application to blank criminal types and administrative offenses of another criterion within the framework of the compatibility of blank criminal types with the requirements of certain and determined law on the provision that it completes or to which it refers which has "a merely technical and not innovative nature" (see Judgment 492/1995; 534/1998; 115/2008). In this sense, Silva Dias points out that the complementary provision must be understood according to the rules of interpretation valid in the Administrative Offenses Law, which in this case excludes the possibility of an analogical integration independent of the acceptance by the primary legal system in which such provision is contained. There are two reasons for this conclusion. On the one hand, the same administrative authority that creates the type of administrative offense may also create a complementary provision. On the other hand, the types of administrative offenses are intended for the sanctioning reinforcement of rules of a changing nature and can be built from an extreme complementarity in relation to the primary order (Dias, 2018, p. 73-74).

According to another judgment, the Constitutional Court concluded that a type of administrative offense was unconstitutional due to the extremely broad limits of the fine it set, given "the possibility that, by accepting extraordinarily broad limits, the foreseeability of the sanction would be called into question" (judgment 574/1995). It should be noted that the Court made clear its position on the applicability of the constitutional principle of criminal legality to the administrative offenses law, which, faced with the problem of the constitutional admissibility of a legal framework of fines with extraordinarily distant minimum and maximum limits, weighed the issue precisely in light of the principle of legality, deciding that it was constitutionally compatible: "the *sub iudicio* rule responds to the requirements implied by the principle of criminal legality enshrined in sections 1 and 3 of Article 29 of the Constitution (*nullum nulla poena sine lege*) [...] and also to the principle of prohibition of penalties with unlimited or indefinite duration (enshrined in No. 1 of Article 30 of the Constitution), which is another dimension or aspect of the principle of legality of criminal offenses" (Judgment 574/1995). At another time, the same Court adopted the opposite position regarding the admissible degree of indeterminacy in the fine, in which it issued a decision that considered a provision stipulating a fine considered excessive and revealing a high degree of indeterminacy to be in violation (Judgment 547/2001).

In terms of the judiciary, the violation of the principle of typicality as an expression of the constitutional principle of legality was again considered by the Constitutional Court in judgments 338/2003 and 358/2005, this time in the context of the determinability of the typical description contained in the rules that typify administrative offenses. Regarding the precept of the requirement of certain law and the limits of legal indeterminacy, the Portuguese Constitutional Court first considered the principle of criminal legality valid for the field of administrative offenses, at least in its dimension of determinability of the type and sanction, but then decided that it was inapplicable (Brandão, 2013, p. 799).

Silva Dias states that a high distance between the maximum and minimum limits of the fine is justified in areas in which the same offense may take on serious forms and include behaviors whose seriousness of the offense is low, and on the other hand, among the purposes of the fine is the recovery of the economic benefit obtained with the offense, thus justifying the fluctuation of the maximum limit of the fines, a limit that must be established in the law. It should be added that Nuno Brandão, like Silva Dias, also defends the preventive effect of the unlimited confiscatory function of the fine (Dias, 2018, p. 74; Brandão, 2013, p. 483 et seq.).

Silva Dias does not object that the economic benefits extracted from the offense are technically calculable afterwards, but he does not agree that this is the relevant level of determinability and foreseeability of sanctions. In order for this plan to reach an acceptable level of achievement, it is necessary to have a legal statute that sets a limit that ensures the *ex ante* determinability of the sanctioning power of the administrative authorities, as well as the achievement of that other purpose of the fine, which is to punish the guilty non-compliance of a duty. These considerations allow us to conclude that the Portuguese legislator acted positively in prescribing this limit in art. 18, No. 2, of the RGCO (Dias, 2018, p. 75).

Alexandra Vilela states that the hypothesis of Article 18(2) makes the parameter for determining the fine highly variable, while making it impossible to define the maximum fine for each administrative offense. Following the interpretation of Oliveira Mendes and Santos Cabral, taking into consideration the inexistence of a criterion to determine the amount of the fine, since said norm does not indicate how to determine it (see Mendes; Cabral, 2009, p. 59 et seq.), Alexandra Vilela concludes that the economic benefit obtained from the administrative offense should not be a criterion for measuring the fine or an aggravating circumstance (Vilela, 2013b, pp. 360-363). Silva Dias disagrees with this interpretation, stating that the number of economic benefits derived from the offense is calculable and, therefore, controllable by the agent. Also, because it is always possible to determine *ex ante* the maximum limit for each specific administrative offense, considering for this purpose the economic benefits, taking into consideration the legal maximum limit, raised by one third in cases where they exceed that limit (Dias, 2018, p. 75).

For Alexandra Vilela, the removal of the illicit benefit fulfills the "preventive function of the main penalty" and also of censuring the act, so that it fulfills relative justice by avoiding the need to raise the maximum limit of the fine up to the removal of the benefit (Vilela, 2013b, p. 364-365). In the opposite direction, Fernanda Palma and Paulo Otero argue that increasing the maximum limit of the fine up to the removal of the benefit is what best achieves relative justice (Palma; Otero, 1996, p. 564). It has been seen, therefore, that the determination of the fine measure raises doctrinal discussions regarding the achievement of justice due to the indeterminacy of this criterion by the provision of the administrative offense.

**The Requirement of Strict Law and the Prohibition of Analogy**

The principle of legality of administrative offenses is based on articles 1, 2 and 3.1 of the RGCO. Crespo Pereira states that, similar to what happens in the criminal field, also in the field of administrative offenses the principle of typicality (certain law) is in force as a corollary of the principle of legality -see arts. 1 and 2 of the RGCO (Pereira, 2015, p. 16). Arts. 1 and 2 of the aforementioned statute result in the prohibition of analogy (strict law) to aggravate the liability of the offense, given its material correspondence with the constitutional principle of criminal legality, enshrined in Art. 29, paragraph[s] 1, 3 and 4, of the CRP, as well as in the observance of the constitutional principle of separation of powers (Brandão, 2013, p. 796-797).

Pinto de Albuquerque states that the Constitution does not establish the guarantee of typicality and neither does it prohibit analogy in the field of administrative offenses, the guarantee and prohibition derived

from the principle of legality (Albuquerque, 2011, art. 2, note. 14, p. 34), but the omission of the express prohibition to analogy may generate a certain "weakening of typicality" (Palma; Otero, 1996, p. 564).

In order to compensate for this lack, the doctrine (see Albuquerque, 2011, art. 2, note. 14; Vilela, 2013b, p. 510 et seq; Brandão, 2013, p. 892 et seq; Dias, 1983, p.330) and case law (see judgment of the Court of Appeal of Lisbon dated June 30, 2008; judgment of the Court of Appeal of Coimbra dated June 9, 1999) give full force to the prohibition of analogy in the Administrative Offenses Law. According to Silva Dias, "a validity that is not ruled by the separation of powers, since the Administration can both create and enforce administrative offenses" (Dias, 2018, p. 78).

Figueiredo Dias has already inferred the prohibition of analogy from the principle of legality provided for in art. 2 of the RGCO. The same guarantees that constitutionally granted to Criminal Law apply to the Administrative Offenses Law, especially those resulting from the principles of legality and the applicability of the most favorable law. "The prohibition of analogical application *in malam partem* and the requirement of typicality and consequent determinability" (Dias, 1983, p. 330) should also be promoted in the Administrative Offenses Law.

In the same direction, Nuno Brandão states that "the imposition of typicality derived from the principle of legality is accompanied, of course, by a prohibition of analogy *in malam partem*" (Brandão, 2013, p. 892). Alexandra Vilela adds that the acceptance of the principle of legality inscribed in art. 2 of the RGCO inherently entails the exclusion of analogy, concluding that "[...] as its consequence, the description of administrative offenses also cannot dispense with the principle of typicality [...]" (Vilela, 2013b, p. 510).

Therefore, the prohibition of analogical application *in malam partem* applies in the administrative offenses law, but as in criminal law, analogy *in bonam partem* is not covered by this prohibition. In addition, regarding the different principles that structure the Administrative Offenses Law, there is a more flexible transposition of these principles from the criminal field to the administrative offenses area.

## FINAL CONCLUSIONS

In Portugal, the offense of mere social order was first instituted in the Constitution of the Portuguese Republic (CRP) and, subsequently, by Decree-Law 433/82, of October 27, which, through its article 96, revoked Decree-Law 232/1979, the first Portuguese legal statute dealing with the regime of administrative offenses.

Some amendments to Decree-Law 433/82 were directed at bringing the regime of administrative offenses closer to the principles and categorical frameworks of Criminal Law. According to the preamble of Decree-Law 433/82, number 2, the question of the attribution of effectiveness to social order law as a differentiated and autonomous branch of Criminal Law was considered as an urgent measure, taking into consideration the changes in the Portuguese legal system, i.e., the legal-constitutional framework that recognizes the administrative offenses law in accordance with the constitutional principles that structure this law.

According to the systematized analysis of the literature, considering also the issue of legal provision and debates in the Courts, the substantive law field of the RGCO replicates or closely follows the generality of the main principles of ordinary criminal law. Regarding the question involving the relationship between the Administrative Offenses Law and Criminal Law, it has been seen that the latter is brought into the discussion in order to, mediately, through its probable influence on the constitutional principles applicable to the Administrative Offenses Law, elucidate questions of constitutionality relating to legal solutions that cannot be seen strictly as signs of identity of the legal system of offenses. The issue of the flexibility and adequacy of the constitutional principles was also noted during the debate in the Constitutional Court, so that the latter recognized in some judgments the need to make them more flexible when they are applicable to the Administrative Offenses Law.

Among the constitutional criminal principles that shape the administrative offenses law are the principle of proportionality, the principle of guilt, the principle of legality and its corollaries. The Administrative Offenses Law can benefit from the application of these principles as it is legitimized and conceived as an integral part of Criminal Law in a broad sense, since the material convergence between criminal acts and

administrative offenses is evident, in addition to providing this Law with greater flexibility in the application of these principles, taking into account that the intervention of administrative offenses does not imply the deprivation of a person's liberty.


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