

Lusíada



Repositório das Universidades Lusíada

Universidades Lusíada

Silva, José Daniel Tavares Fernandes da, 1953-

The plural system of CA's (Criminal Associations) repression in Portugal

<http://hdl.handle.net/11067/7197>

<https://doi.org/10.34628/ct67-3641>

Metadados

Data de Publicação	2023
Palavras Chave	Crime organizado - Portugal, Direito penal - Portugal
Tipo	article
Revisão de Pares	Não
Coleções	[ULL-FD] LD, s. 2, n. 29 (2023)

Esta página foi gerada automaticamente em 2024-05-02T15:47:07Z com informação proveniente do Repositório

THE PLURAL SYSTEM OF CA'S (CRIMINAL ASSOCIATIONS) REPRESSION IN PORTUGAL

(Conference Paper) ⁶⁸

O SISTEMA PLURAL DE REPRESSÃO DAS ASSOCIAÇÕES CRIMINOSAS EM PORTUGAL

(Notas de Conferência)

José Daniel Tavares⁶⁹

DOI: <https://doi.org/10.34628/ct67-3641>

1. International regime

The principal international agreement about organized crime is the United Nations Treaty against Transnational Organized Crime (UNTOC)⁷⁰, which expresses in its article 1 the objective of “promoting cooperation to prevent and combat more effectively transnational organized crime” and defines in the article 2 organized criminal group as a structured group of three or more people, with temporal stability and acting in concert, to commit one or more serious crimes and to obtain illicit profit.

2. Portuguese Criminal Association Punishment Regimes

In compliance with the article 5 of the same Treaty in which the Parties accept the obligation of “Criminalization of participation in an organized criminal group”, the general regime for the punishment of members of the criminal associations is included in article 299 of the Portuguese Penal Code (PC) which is applicable to the members of Criminal Associations (henceforward CA's) that practice all the crimes, except those that are included in the special regimes.

⁷⁰ Palermo Convention of 2000.11.15. Published in Portugal in the Official Journal (D.R.) n.º 79, of 2004.04.02.

There are also five special regimes that punish the members of criminal associations that commit the following crimes:

- Trafficking in narcotic drugs and psychotropic substances and money laundering originated therein (1), criminal responsibility for unsporting behavior (2) General regime of fiscal infractions (3) Entry, stay, exit and departure of foreigners from the national territory (4) Anti-terrorism legislation (5).
- It means that the same law foresees the crimes and the criminal association that commit them.
- The precepts aim to prevent and punish the increased danger to the society resulting from joint action, being the protected legal asset also the public peace.
- Some norms that typify and punish individually the crimes are referred as examples, except drugs which regime has particular questions in relation to the punishment of CA's elements.

Note: Whether in the general regime or in the special ones, the individual punishment for participating in the criminal association is done in conjunction with the crimes committed, because the criminal association is an autonomous crime of those committed by the organization.

3. General Regime

As we saw, the general regime of punishment of the criminal group (CG), organization (CO) or association (CA) consists in the article 299.^o of Penal Code⁷¹, predicting the number 1 that the impulse and foundation of a CA to commit 1 or more crimes is punished between 1 and 5 years in prison, in the number 2 that the integration, support and assistance (providing weapons, ammunition, places of custody or meeting or recruitment of elements) is punished from 1 to 5 years in prison, in the number 3 the leadership or management punished between 2 to 8 years in prison, in number 4 the mitigations for members that help prevent continuation and contribute to the investigation. (attenuation or waiver of penalty, and in number 5 the minimum number of elements (3) and temporal stability.

4. Special regimes

4.1 Drug trafficking

4.1.1 International Regime

⁷¹ The three expressions appear in the article 299.

The aggravation of penalties complies with the provisions of article 3/5 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 1998.12.19⁷².

4.1.2 National regime: Decree Law N.º 15/93, of 1/22

Individual punishment: As we announce before, in the case of drugs trafficking, the individual regime of punishment influences the punishment of the elements of the CA's taking place the application of the special and more grievous regime of the article 28 (only to the articles 21 and 22) and the general regime (article 28 of Penal Code) to the other crimes predicted in the Decree Law No. 15/93, of 1/22.

Article 21.º (Trafficking and other illicit activities) predicts (n.º 1) that who, without authorization cultivates, produces, manufactures, sells, distributes, buys, transports (...) or illicitly transfers plants or substances foreseen in the attached tables⁷³ is punished between 4 to 12 years in prison, while the n.º 2 predicts that who, contrary to authorization (ex: laboratory) proceeds to traffic, is punishable between 5 to 15 years in prison.

On the other hand, n.º 3 predicts that who grows plants or manufacture substances other than the authorization title, is punished between 5 to 15 years in prison, while n.º 4 predicts that who practices the above behaviors in relation to less aggressive substances is punished between 1 to 5 years in prison.

Article 22.º (Precursors) refers (n.º 1) that who manufactures, exports, imports, transports or distributes equipment, materials or psychotropic substances for use in the illicit cultivation, production or manufacture of narcotics is punished between 2 to 10 years in prison, while n.º 2 predicts that who without authorization, possess equipment, materials or psychotropic substances, knowing that they are or will be used in the illicit cultivation, production or manufacture of narcotics, is punished between 1 to 5 years.

Otherwise, n.º 3 predicts that who, being the holder of authorization uses it for illicit practices is punished, in the case of paragraph 1, between 3 to 12 years in prison, and in the case of paragraph 2 between 2 to 8 years in prison.

Article 28.º (Criminal Association)

⁷² Published in Portugal in the Official Journal (D.R.) n.º 205, of 1991.09.06.

⁷³ The tables contain the list of narcotics and they are regularly actualized.

This is the more serious regime in terms of penalties and number of members, because only requires two members to punish them for the autonomous crime of CA.

This article punishes CA's for committing the crimes provided in articles 21.º and 22.º of this law.

In its n.º 1 it predicts that the promotion or foundation of a criminal association for drug trafficking is punished between 10 to 25 years in prison (1 to 5 in art 299 PC)

The n.º 2 refers that the collaboration, adherence, and support is punished between 5 to 15 years in prison (1 to 5 in art 299.º PC), otherwise the n.º 3 predicts that the leadership or management are punished between 15 to 25 years in prison (1 to 5 in art 299 PC).

The CA's destined to launder the advantages deriving from drug trafficking are punished (n.º 4) relatively to the numbers 1 and 3 of article 21.º between 2 to 10 years, and relatively to the number 2 between 1 to 8 years in prison (1 to 5 in art 299.º PC)

The article 31 refers the attenuation or waiver of penalty.

The punishment preview in n.º 1, 2, 3 of members of the CA is done in contest with articles 21.º and 22.º of D. L. 15/93, while the punishment preview in n.º 4 is done in contest with article 368-A (Laundering) of the Penal Code.

Other articles

Article 25.º (Less serious traffics) Is punished from 1 to 5 years in prison or, depending on the substance, up to 2 years in prison or a fine of up to 240 days. The law doesn't clarify what less serious traffics is.

Article 26.º (Trafficker-consumer) predicts that detention for personal use in an amount that does not exceed the average individual consumption for 5 days is punished up to 1 or 3 years in prison depending on the substances.

Article 27.º (Abuse of the exercise of the profession)

1-The penalties provided for in articles 21, paragraphs 2 and 4 and article 25 are applied to a doctor who prescribes, administers, or delivers substances or preparations indicated therein for non-therapeutic purpose.

2-The same penalties apply to the pharmacist or his substitute that sells or delivers those substances or preparations for non-therapeutic purposes.

3 (...)

4-The delivery of substances or preparations to a manifest mental patient or a minor, (...), is punishable with a prison sentence of up to 1 year or a fine of up to 120 days. (see article 19º - even for therapeutic proposes the delivery, in this cases has to be done to the educator)

5. The attempt is punishable

Article 29.º (Incitement) Punishes the incitement to use drugs for up to 3 years or a money penalty, increased by 1/3 if the instigated is a minor or if the instigated is in the care of the instigator for treatment, education, surveillance or custody or even if the instigator is an employee in charge of prevention or treatment, physician or pharmacist, consumer treatment officer, prison, military unit or schools

Article 30.º (Traffic and consumption in public or meeting places)

1 - Punishes the owner, manager, director or operator of a hotel, restaurant, cafe, tavern, club, house, or meeting, show or entertainment venue, who consents to their being used for trafficking or illicit use of plants, narcotic or psychotropic substances or preparations, between 1 to 8 years imprisonment.

2 - Punish anyone who, having a building, fenced area or vehicle, consents that they are habitually used for the trafficking or illicit use of plants, narcotic or psychotropic substances from 1 to 5 years in prison.

Reflections about the system:

1. If the crimes provided for in article 27.º are committed by 2 or more doctors and or with pharmacists in a criminal association, it is applied to the members of this criminal association the general regime (article 299.º of the Penal Code) with much lighter penal frameworks than the one of article 28.º of Decree Law n.º 15/93, of 1/22. Is this compatible with the responsibility of their special profession and gravity of their crimes? (We note once that article 28.º only refers its application to articles 21.º and 22.º)

2. If the crimes of incitement (article 29.º) are committed by several employees (more than three) in a criminal association, for instance, in the interior of an institution of prevention or treatment, prison, military unit or schools, it will be fair to the elements of this criminal association the punishment in accord with article 299.º of the Penal Code, or would be justified the application of article 28.º of Decree Law n.º 15/93, of 1/22, vis a vis to the gravity of the criminal conducts?

3. Would not the application of article 28.º of D.L. n.º 15/93 also be justified, if the crimes provided for in article 30.º are committed by two or more responsible in a criminal association?

4. What if, in association with a bank employee, they launder the advantages obtained from the previous behaviors of drugs traffics? Does article 299.º of the Penal Code or article 28.º, n.º 4 of D.L. n.º 15/93 apply?

4.2 Crimes against sporting truth-Law n.º 50/2007, of 8/31

Article 11.º (Criminal association)

N.º 1 - Predicts that the promotion, foundation, participation and support of a CA for the practice of 1 or more crimes against sporting truth are punished between 1 to 5 years in prison.

N.º 2 - Predicts that the leadership or management are punished between 2 to 8 years in prison.

N.º 3 - Refers the minimum number of elements (three) and temporal stability

Individual punishment

Article 8.º - Passive corruption: The request or acceptance of an advantage to falsify the result of sports competition are punished between 1 to 8 years in prison.

Article 9.º - Active corruption: The gift or promise to a sports agent of an advantage to falsify the result of a sports competition is punished between 1 to 5 years in prison.

Article 10.º - The influence trafficking is punished between 1 to 5 years in prison.

Article 10-A.º - The undue offer or receipt of advantage is punished with imprisonment of up to 5 years or fine up to 600 days.

Article 11-A.º - Unsportsmanlike Betting made by a sports agent on the results of competitions in which he is involved is punished up to 3 years in prison and a fine of up to 600 days.

Note: Penalties equal to the general regime (Article 299.º PC) for promotion, foundation, participation, or support (1 to 5 years - n.º 1) and for leadership and direction (2 to 8 years -n.º 2).

Article 13.º - Attenuation or waiver of penalty.

4.3 Tax crimes - Law n.º 15/2001, of 6/05-General regime for tax infringements

Article 89.º - (Criminal association)

N.º 1 - Predicts that the promotion and foundation of a CA for the practice of tax crimes are punished between 1 to 5 years in prison.

N.º 2 - Refers that the support, supply of weapons, storage sites or aid in the recruitment of new members are punished from 1 to 5 years in prison.

N.º 3 - Predicts that leadership or management is punished between 2 to 8 years in prison.

N.º 4 - Attenuation or waiver of penalty.

Note: Penalties equal to the general regime (Article 299.º PC) for promotion, foundation, participation, or support (1 to 5 years - n.º 1) and for leadership and direction (2 to 8 years - n.º 2).

Some examples of tax crimes. Individual punishment

Article 87.º - Tax Fraud: 1 to 8 years in prison, depending on the amount obtained, for improperly obtaining property attributions from the tax administration or the administration of social security through false declarations or false documentation.

Article 88.º - Credit frustration: 1 to 2 years in prison whoever makes disappear, dispose of, or encumber their assets with the intention of, in this way, frustrating the tax credit or debt to social security institutions.

Article 92.º - Smuggling: 1 to 4 years in prison whoever, among other behaviors, imports, or exports, introduces or removes goods from the national territory without presenting them to the customs offices (...) for payment of the customs tax benefit legally due.

Article 106.º - Fraud against social security: Up to 3 years (or from 1 to 5 years) in prison for the conduct of employers, self-employed, workers and beneficiaries aimed at non-liquidation, delivery or payment or the undue receipt of social security benefits, obtaining an illegitimate advantage of value greater than € 7,500.00.

4.4 Aid to illegal emigration - Law n.º 23/2007, of 7/04: Entry, stay, departure and removal of foreigners from the national territory (foreigners law)

Article 184.º - Illegal Immigration Aid Association

N.º 1 - Provides that the promotion and foundation of a CA to aid illegal immigration is punished between 1 to 6 years in prison.

N.º 2 - Refers that the integration, support and assistance in recruiting elements is punished between 1 to 6 years in prison.

N.º 3 - Provides that the leadership or management is punished between 2 to 8 years in prison.

N.º 4 - Refers that the attempt is punishable.

N.º 5 - Provides that the penalties applicable to legal persons (article 182.º, n.º 1) are fines or banning the exercise of the activity from 1 to 5 years.

Example of crimes using foreigners.

Article 183.º - Aid for illegal immigration

N.º 1 - Provides that who favor or facilitate the illegal entry or transit of foreign citizens in national territory is punished for up to 3 years in prison.

N.º 2 - Refers that who favor or facilitate the illegal entry, stay or transit of a foreign citizen in national territory, with a lucrative intention is punished from 1 to 5 years in prison.

N.º 3 - Provides that who practice the above conduct by transporting or keeping the foreign citizen in inhuman or degrading conditions or by endan-

gering their life or causing serious harm to their physical integrity or death is punished between 2 to 8 years in prison.

N.º 4 - The attempt punishable

N.º 5 - The penalties applicable to legal persons (article 182.º, n.º 1): fine or ban on the exercise of the activity from 1 to 5 years.

4.5 Fight against terrorism: Law nº 52/2003, de 8 /22

Article 2.º, n.º 2: Terrorist Organizations

N.º 2 - Provides that promotion and foundation of a terrorist organization, membership or support, namely through the provision of information or material means are punished between from 8 to 15 years in prison.

N.º 3 - Refers that leadership or management is punished between- 15 to 20 years in prison.

N.º 4 - Provides that the practice of preparatory acts for the constitution of a terrorist organization is punished from 1 to 8 years in prison.

N.º 5 - Attenuation or waiver of penalty.

Article 2.º, n.º 1: General characterization of terrorist organizations and its object and practices:

Group of two or more people acting in concert, aiming to undermine national integrity and independence, to alter, seriously affect the functioning of the State and its institutions (...) intimidate certain people, groups of people or the general population, through crimes v. g. against the life, physical integrity or liberty of persons.

Also, against the security of transport and communications, create danger through fire, explosion, release of radioactive substances or toxic or asphyxiating gases (...) contamination of food and water (...) make it impossible for communication routes, public service facilities to function (...) development of biological or chemical weapons, use of nuclear energy, firearms, explosives (...)

NOTE: This is not an exhaustive list.

Individual punishment

Article 4.º - Terrorism (Individual punishment) provides that who commit terrorist acts (art. 2.º, n.º 1), assistance in obtaining means and recruiting new elements, training, message dissemination is punished from 1 to 10 years in prison

Article 5.º - International terrorism 1 - Provides that who commits terrorist acts with the aim of harming the integrity or independence of a foreign State, altering or subverting the functioning of the institutions of that State or of a public international organization (...) or intimidating certain groups of people or populations is punished between 2 to 10 years in prison, or with the penalty corresponding to the crime committed, increased by 1/3 of its minimum and maximum limits, if equal to or greater than that.

Article 5-A.º - Financing of terrorism – The delivery, collection or possession of funds or goods and products or rights that can be transformed into funds, with the intention of using, or the possibility of being used, in the planning, preparation or commitment of terrorist acts are punished with imprisonment between 8 to 15 years.

2 - (...)

3 - Mitigating circumstances

6. General characterization of members of AC's and its will, stability, intents and purposes in every regimes:

The will formed within the criminal association is autonomous and superior to that of its members who are subordinated to the collective will being their willful misconduct aimed at consenting to the commitment of one or more crimes, without a limit of time.

The promoter or founder is who has the idea, and may not perform tasks, the member joins the ranks and is always available, the supporter provides assistance knowing that this is intended for the association. If he participates becomes a member, and the chief or leader directs the command structure and controls the process of forming the collective will, and he has the last word about every decisions.

7. Investigative and fight special powers of criminal associations

We begin referring the article 1.º, Alinea i) that classifies «Terrorism» as the conduct that are part of the crimes of terrorist organizations, international terrorism and financing of terrorism, and the article 1.º Alinea m), both of the Portuguese Criminal Procedure Code, that considers, between others, the criminal association as a typical conduct of highly organized crime. This last norm has an operative nature, legitimizing the use of reinforced means to the prevention, investigation, and repression of the Criminal Associations.

In this sense, we have the the following regimes:

7.1 Law N.º 49/2008, of 8/27-Criminal Investigation Organization Act

This law predicts in its article 7.º, n.º 2, alinea g), the absolute reserve powers of the Judiciary Police in the investigation, among others, the criminal associations (regardless of the crimes committed) and, in the article 7.º, n.º 2, alinea l) the terrorist organizations, terrorism, international terrorism and terrorist financing.

Absolute reservation means that its investigation cannot be attributed by the Public Prosecutor's Office to other Criminal Police Bodies-OPC's [Public Security Police (PSP), Republican National Guard (GNR) and Foreigners and Borders Service (SEF)].

7.2 Law N.º 5/2002, of 01/11 "Special Regime for Collection of Evidence, Breach of Professional Secrecy and Loss of Property in Favor of the State"

Article 1.º - Scope of application (catalog)

1 - This law establishes a special regime for the collection of evidence, breach of professional secrecy and loss of property in favor of the State, relating to the crimes of:

- a).....
- b) Terrorism, terrorist organizations, international terrorism and terrorist financing;
- (...)
- j) Criminal association;

Applicable measures: Collection of evidences - placement of voice and image recording devices inside suspicious installations - (article 6.º), breach of professional secrecy of Banks and the Tax Administration server's (articles 2.º, 3.º, 4.º, 5.º), loss of assets in favor of the State. In case of conviction, the law assumes that the difference between the assets that the defendant would be expected to have originated by his legal activity and what he actually has become from criminal activity, being declared lost and surplus in favor of the State. (articles 7.º, 12-A.º).

This presumption can be rebutted, in whole or in part through proof of the lawful origin of the patrimony or part of it (article 9)

Note These measures can only be used in the investigation of crimes included in the catalog (Article 1)

7.3 Law n.º 101/2001, of 8/25: Covert Actions for purposes of prevention and criminal investigation

Article 1.º - Object

1 - (...)

2 - Covert actions are those carried out by criminal investigation officials or by a third party acting under the control of the Judiciary Police for the prevention or repression of the crimes indicated in this law, with the concealment of their quality and identity.

Article 2.º - Scope of application (catalog)

Undercover actions are admissible in the context of the prevention and repression of the following crimes:

- a).....
- f) Terrorist organizations, terrorism, international terrorism and terrorist financing;
- g)
- j) Criminal associations.

Note: These measures can only be used in the investigation of crimes included in the catalog (Article 2.º).

7.4 Law n.º 36/94, of 9/29: Measures fighting corruption and economic and financial crime

Article 1.º

1 - Competences of the Public Prosecutor's Office and the Judiciary Police, through the National Anti-Corruption Unit, to carry out (...) preventive actions relating to the following crimes:

- a).....
- (...)
- d) Economic and financial infractions committed in an organized manner, using computer technology.
- e) Economic and financial infractions of an international or transnational dimension

Conclusions

1. Face to the difficult problem of proving in court secret agreements of will to commit crimes done by the elements of a Criminal Association, we think that the Public Prosecutor's and the Criminal Policial Bodies should have at their disposal more and best means.

2. In addition to the considerations already made about the article 28.º of the Drug Law which restricts its application to the CA's to practice the crimes of the 21.º and 22.º articles, we think that the penalties of the general regime should be higher because the simple existence of a CA is a very serious danger to the society because they are constantly looking for new opportunities of crime, some of them are most profitable and more dangerous than drugs trafficking (ex: traffics of human beings, of human organs, of arms, of rare species (fauna and flora) sexual exploitation, in special of minors and children, corruption, sale of defective food and medical products, illegal and polluting collection and discharge of toxic waste) which, when practiced in CA, their members are punished with the light penalties of the article 299.º of Penal Code.

Otherwise, we have special regimes whose existence has no justification because their penalties and member's number are the same of the general regime like criminal responsibility for unsporting behavior and the general regime of fiscal infractions.

(RESUMO EM PORTUGUÊS)

1. Regime geral

Cumprindo o artigo 5.º da Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional de 2000 (UNTOC) que exprime o objetivo de "promover a cooperação para prevenir e combater mais eficazmente a criminalidade organizada transnacional", em Portugal o regime geral de punição dos elementos da associação criminosa consta do artigo 299.º do Código Penal com

penas entre 1 e 8 anos de prisão, sendo 3 o número mínimo de elementos, atuando concertadamente e com estabilidade temporal para a prática de um ou mais crimes independentemente da pena mínima ou máxima aplicável.

O preceito visa prevenir e punir o perigo acrescido resultante da atuação conjunta e da subordinação dos membros à vontade criminosa coletiva.

A associação criminosa constitui um crime autónomo dos praticados pela organização, ocorrendo punição em concurso.

2. Regimes especiais

São punidas por leis especiais as associações criminosas para:

- O tráfico de estupefacientes e de substâncias psicotrópicas e branqueamento dos bens nele originados (Artigo 28.º do Decreto-Lei n.º 15/93, de 22/01) com penas variáveis entre 5 e 25 anos de prisão, agravamento resultante da exigência do artigo 5.º, n.º 3 da Convenção de Viena de 1988 sobre este tráfico. Número mínimo de elementos: 2;
- Crimes contra a verdade desportiva (artigo 11.º da Lei n.º 50/2007, de 31/8). Penas de 1 a 8 anos de prisão;
- Crimes tributários (artigo 89.º da Lei n.º 15/2001, de 05/6). Penas de 1 a 8 anos de prisão;
- Auxílio à imigração ilegal (artigo 184.º da Lei n.º 23/2007, de 04/7). Penas de 1 a 8 anos de prisão.
- Associações terroristas (Lei n.º 52/2003, de 22/8). Número mínimo de elementos: 2. Penas de prisão de 2 a 15 anos. Punição do financiamento.

3. Medidas especiais

Portugal dispõe de meios reforçados na prevenção, investigação e repressão, como a quebra de sigilo bancário e fiscal, o registo de voz e imagem e a perda de bens (Lei n.º 5/2002, de 11/01) e o recurso a ações encobertas (Lei n.º 101/2001, de 25/8).