

A PROPOSAL ON THE CONFIGURATION OF THE PRINCIPLE OF THE PROHIBITION ON EXCESSIVENESS AS A TEMPLATE FOR THE LEGITIMACY OF LEGAL DECISIONS ON INCRIMINATION

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Eurocrim 2015, Porto, Portugal

The treatment that both criminal doctrine and the Spanish Constitutional Court have given to the principle of the prohibition on excessiveness (principle of proportionality in a broad sense) should be reviewed.

To begin with, I would like to call attention to the fact that the application of its three integrating principles is usually done by following the same order in which they are presented: confirmation of the suitability of the criminal sanction of a behaviour, its necessity is questioned and, finally, whether the planned punishment is proportionate to the seriousness of the crime is weighed up. Secondly, the usual partial superimposition of the contents of the principles of necessity and proportionality in a strict sense should be eliminated.

On the other hand, two levels or phases in which the principles of suitability, necessity and proportionality in a strict sense are active should be distinguished, so as to define the role that each one of these principles plays in the process of incrimination (or decriminalization).

At a first level, it is questioned whether a particularly damaging social behaviour should be repressed and what the nature of that repression should be (extrajudicial, civil, administration, criminal...). Taking Criminal Law as a point of reference, this first level could be described as an external one, given that aspects enter into play that advocate opting either for its intervention or for its total or partial exclusion. At an external level, the “if”, the “how” and the “up to what point” of the criminal law measure are clarified.

When the criminal measure appears fully legitimized, a second level is reached in which the aforementioned principles once again intervene, together with other criminal principles, in the specific definition of the criminal offence, of its component parts and of the abstract punishment. Following the same criteria used earlier, this second level can be called “internal”.