



Research Article

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Proportionality: A Principle to be Re-evaluated in Albanian Criminal Law

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Abstract

The numerous amendments to the Albanian Criminal Code introduced over the years have continuously toughened penalties for criminal offences, raising doubts about the legislator's adherence to the proportionality principle. This issue has aroused an interest in treating proportionality as a fundamental principle of criminal law, particularly in guiding the legislator in determining appropriate punishments for criminal offences. Doctrine and jurisprudence constantly emphasize that disproportional sanctions, on the one hand, affect the re-educational and re-socialization processes, and on the other hand, they affect the discretion of the judge who, during the process of individualization of punishment, must adapt the penalty to the social danger of the criminal offence. The Albanian Constitutional Court's jurisprudence has addressed proportionality issues in a significant judgment that opened the possibility of control over the legislator's political discretion. In this regard, the Albanian Constitutional Court considered some provisions of the Criminal Code in breach of Article 17 of the Constitution because the punishment provided for the criminal offence was disproportionate, affecting in this way the re-educational process of the perpetrator. On this occasion, the Court stated that the penalty is determined by weighing the social danger of the crime and the perpetrator's level of culpability. Furthermore, the Court considered that since criminal punishment restricts fundamental rights, it should be limited to those actions or omissions that, according to the principle of proportionality, are comparable in importance to the values they safeguard.

Keywords: Principle of proportionality, criminal offence, punishment, social danger, criminal law

1. Introduction

The continuous increase in crime, along with the rapid advancement of technology, has created new challenges in the criminal justice system, posing the need to change criminal legislation. The Albanian Criminal Code during these years has been subject to interventions that have led to significant changes, such as toughening penalties and the creation of new criminal offences (See Elezi, 2021; Recchia, 2020, p. 3; Sgubbi, 2019; Musco, 2004, pp. 183 et seq.). This tendency, present not only in the Albanian criminal legislation but also in other European countries, is often considered by the legislator as the only way to fight crime, bypassing the preventive policies that are constantly

emphasized by contemporary criminal doctrine (See Viganò, 2021).

Those changes are often associated with criminal populism (Nikolli, 2016, p. 194; Fiandaca, 2013, pp. 95 et seq.) and are particularly noticeable with the changes made from 2013 to the subsequent amendments to the Criminal Code in 2019, 2020, and 2021. As a result, a new criminal code is currently required.

The legislator has a broad scope of action in drafting criminal policies¹ and defining the overall strategy of the fight against crime in the country² (Viganò, 2021, p. 154). In this regard, the determination of the criminal offence and the type or severity of punishment is within the political discretion of the legislator (See Pizzorusso, 1971, pp. 192 et seq.; Pulitanò, 2017, p. 49; Merlo, 2016, p. 1439; Brunelli, 2007, pp. 181 et seq.). Nevertheless, in all this discretion, the legislator's power cannot be considered unlimited, but it is conditioned by the observance of the basic principles of constitutional and criminal law, among which is proportionality (Viganò, 2021; Merlo, 2016, p. 1457). This principle is closely related to criminal law, in particular concerning the choices of the legislator in determining criminal policies, both in foreseeing the type of illegal actions and in determining the punitive measures that will be applied to them (Manes, 2013, p. 104; Mazzacuva, 2020, p. 1; Viganò, 2021, pp. 239 et seq.).

The principle of proportionality was brought to the attention of the Albanian Constitutional Court in 2016 with decision No. 9, in which the Constitutional Court clearly stated the non-observance of the principle of proportionality by the legislator, who has provided for the illegal possession of firearms and ammunition in public places a disproportionate punishment in relation to the criminal offence. This decision allows control over the legislator's discretion in determining the penalty for the criminal offence. In this sense, the Constitutional Court stated that the principle of proportionality implied the need for punishment to be an indicator of the seriousness of the criminal offence committed, in compliance with Article 17 of the Constitution and in respect of the re-educational function that characterizes criminal punishment.

2. Literature Review

Proportionality issues between punishment and crime have constantly accompanied criminal law. However, it was the Enlightenment philosophy that appropriately addressed this principle. One of the prominent representatives of Enlightenment thought, Cesare Beccaria, has dealt with proportionality, proposing the idea that punishments should be proportionate to the crime committed and the degree of guilt of the perpetrator (Beccaria, 1764). Jeremy Bentham has further elaborated this theory, considering that the legislator should strike a balance between the harm caused to the perpetrator by the imposition of a penalty and the benefits to society in terms of preventing the commission of offences (Bentham, 1780). In this regard, the penalty must be appropriate and sufficient to deter the offender from repeating the offence. It is worth noting that a proper analysis of the control of proportionality should be attributed to the jurisprudence of the German administrative and constitutional court (Pradel, 2019; Galetta, 1988; Sandulli, 2006).

Differing opinions have emerged on the doctrine in relation to the principle of proportionality in criminal law. Part of the doctrine considers this principle one of the fundamental principles governing the rule of law and the administration of justice in general (Fiandaca & Musco, 2019, p. 692; Patroni Griffi, 1998, p. 61). According to this approach, proportionality is inextricably related to the main objectives that characterize criminal punishment (Angioni, 1983, pp. 164 et seq.), such as re-educational and re-socialization goals (Grimaldi, 2020, p. 6; Viganò, 2021, pp. 61 et seq.) and general and specific deterrence³.

¹ Italian Constitutional Court, Decision no. 68, 23 March 2012.

² See Decision of the Albanian Constitutional Court no. 55, 21 July 2015.

³ For more see the Decision of the Albanian Constitutional Court no. 9, dated 26 February 2016, para. 31.

In this context, in Anglo-Saxon doctrine, Von Hirsch separates proportionality into two major categories: "ordinal proportionality" and "cardinal proportionality" (Von Hirsch, 1985, pp. 39 et seq.). According to "ordinal proportionality," penalties are classified based on the social danger of the criminal offence. This principle includes some other sub-principles such as: criminal offences with similar social danger should be punished with similar punishments; criminal offences characterized by greater social danger should be punished with heavier punishments; and criminal offences that have a higher social risk than others should be punished with heavier penalties (Von Hirsch, 1993, p. 18; Von Hirsch & Ashworth, 2005, pp. 139 et seq.). These principles must be respected by the legislator when establishing the maximum and minimum level of the penalty, as well as by judges when determining the severity of the penalty in a concrete case (Viganò, 2021, p. 162). Whereas "cardinal proportionality" assesses the appropriateness of the penalty for a specific criminal offence, balancing the damage caused to the perpetrator because of the punishment with the damage caused by the criminal offence (Von Hirsch, 1993). Currently, doctrine and jurisprudence consider the principle of proportionality one of the essential criteria that should guide the legislator in determining the penalty for a criminal offence (Viganò, 2021).

The literature examined in this study is an analysis of several theories proposed by doctrine on the issue of proportionality. This study will also focus on the judgments of the Albanian Constitutional Court, which has ruled on proportionality control by repealing some provisions of the Criminal Code that were considered unconstitutional because in violation of Article 17 of the Albanian Constitution.

It is essential to notice that, according to current doctrine, proportionality represents a fundamental right for the perpetrator, consisting of the right not to be subjected to excessive sanctions (Viganò, 2021, pp. 226-230). This fundamental right protects the individual from legislative arbitrariness (Insolera, 2017, p. 208; Merlo, 2017, 1428).

3. Research Method

This paper aims to analyze the principle of proportionality as an essential principle of criminal law that is specifically addressed to two recipients: on the one hand, it addresses the legislator in determining the punishment, thus limiting the political discretion of the latter; on the other hand, it refers to the judge in the process of individualization of punishment in the concrete case.

This research uses qualitative research methods to analyse the principle of proportionality in criminal law and its relevance as a constitutional principle. The paper is divided into three sections, where the first part refers to the legal provisions established in Albanian legislation regarding the principle of proportionality. In the second part of the paper, we analyse the different doctrinal perspectives on the concept of proportionality, its relevance, and the evolution that this principle has undergone in criminal law. Special attention merits the jurisprudence of the Constitutional Court, which has played a significant role in affirming the principle of proportionality. Accordingly, we refer to the jurisprudence of the Albanian Constitutional Court, which has recently taken a step forward in affirming the principle of proportionality. The analysis of doctrinal opinions and constitutional jurisprudence will help us understand the nature of the principle of proportionality, how it affects criminal law, and its importance in the administration of justice.

4. The Principle of Proportionality in Albanian Criminal Law

The principle of proportionality is one of the foundations of criminal law, as stated in the Constitution of the Republic of Albania:

"Restrictions on the rights and freedoms provided in this Constitution can be established only by law for the public interest or the protection of rights of others. The restriction of rights must be in proportion to the situation that has dictated it. These restrictions may not infringe on the essence of freedoms and

rights and, in no case, may they exceed the restrictions provided for in the European Convention on Human Rights.⁴

This provision is one of the most significant guarantees offered for the individual's fundamental rights and freedoms, requiring that any restriction of those rights should be balanced and in proportion to the situation that has dictated it.

In this sense, it is critical to remember that criminal law needs to be in full compliance with the Constitution as it has a significant impact on fundamental human rights, beginning with personal freedom (Hoxha et al., 2019, p. 32; Viganò 2021, p. 286). The implementation of unconstitutional laws would lead to serious violations of fundamental human rights and freedoms.

It is worth noting that the Albanian Criminal Code does not provide for the principle of proportionality, but nevertheless, this principle is one of the foundations of criminal law in terms of punishment. This is reflected in the provision made for this concept in the Juvenile Criminal Justice Code in 2017, which establishes the principle of proportionality as one of the fundamental bases in determining a juvenile's punishment in Article 13. Specifically, this code provides that:

"Any measure taken against a juvenile in conflict with the law must be in relation to the circumstances of the crime, the personality of the juvenile, and in accordance with the needs related to age, education, personal conditions, family, social, environmental, and developmental needs, and other needs of the juvenile, including, where appropriate, special needs.⁵"

The principle of proportionality in Albanian criminal law should be viewed from two perspectives: first, in limiting the legislator's political discretion, as the Albanian Constitutional Court stated in 2016, and second, in restricting the judge's discretion when adapting the punishment to the degree of guilt of the perpetrator of the criminal offence, the damage caused, as well as the mitigating and aggravating circumstances (Elezi, 2017; Hoxha et al. 2019; Muçi, 2012; Viganò, 2021, pp. 171 et seq.).

5. The Principle of Proportionality as a Basic Principle of Criminal Law

The proportionality between punishment and criminal offences has always been an issue in criminal law in different periods (Pulitanò, 2017, p. 49). This is due to the fact that there have always been efforts to create punishments that correspond to the administration of justice. In today's society, the administration of justice is one of the critical topics of the rule of law, closely related to several principles, including the principle of fairness in determining guilt and sentence and that of humanism⁶, provided as the basic principles on which the criminal law of the Republic of Albania is based. The principle of proportionality also plays a significant role in the administration of justice, although it is not the only criterion that influences the determination of absolutely fair punishments (Pulitanò, 2017, p. 49).

The principle of proportionality (See Galetta, 1988, pp. 11 et seq.; Sandulli, 2006, pp. 4643 et seq.; Nicotra, 2015) refers mainly to the determination of the measure of punishment and the adaptation of the latter to the social danger of the criminal offence (Palazzo, 1998, p. 374; Insolera, 1997) as well as to the degree of guilt of the offender. There are differing opinions on this issue within the doctrine. In this regard, it is worth mentioning Carrara's opinion, according to which a penalty is considered proportional if it properly reflects the damage caused by the criminal offence and the

⁴ Article 17, para. 1, Constitution of the Republic of Albania.

⁵ Article 13, Juvenile Criminal Justice Code, law no. 37/2017.

⁶ Article 1/c, Principles of the Criminal Code: "The Criminal Code is based on the constitutional principles of the rule of law, equality before the law, justice in determining guilt and punishment, protection of the best interests of children, and humanism. Enforcement of criminal law by analogy is not allowed", Albanian Criminal Code.

degree of "moral force" (Carrara, 1859, § 700), including in the latter forms of guilt such as intent, negligence, and their subdivisions, the ability of the subject to understand his actions or inactions and the consequences that come with them, as well as other elements such as age, gender, forms of irresponsibility, ignorance of the criminal law, or the influence of alcohol and other substances (Carrara, 1859, § 161; Viganò, 2021, p. 140). In this way, Carrara asserts that the state can exercise *ius punendi* within ethical limits by respecting the *an* and *quantum* of penalty in order to administer justice, which on the one hand, excludes the punishment of subjects who are not guilty of a criminal offence and, on the other hand, requires the sentence to be proportionate to the offence (Carrara, 1859, § 161; Viganò, 2021, p. 141).

In criminal law, the principle of proportionality must be seen from two perspectives. Firstly, in the non-implementation of penalties that are more severe than the criminal offence committed and the perpetrator's guilt, and secondly, in the non-implementation of penalties that are lighter than the perpetrator's degree of guilt (Frisch, 2014, p. 166). As a result, the sentence must reflect the author's degree of guilt; precisely, this reflection makes it a deserved punishment⁷ (Frisch, 2014, p. 171; Viganò, 2017, p. 63; Roxin, 2005; Bonomi, 2021, p. 203) by both the perpetrator and society (See Fiandaca & Musco, 2019, p. 692; Robinson, 2012, p. 211). According to the doctrine, the most appropriate and fair punishment is one that increases people's belief in the judicial system (Frisch, 2014, p. 168; Roxin, 2005).

Part of the doctrine links the legality of the penalty measure with the final purpose of punishment, considering unnecessary penalties that do not correspond to this purpose (Viganò, 2021, pp. 122-123). From this point of view, if we analyze the main goals that characterize criminal punishment, it is worth mentioning that in the first place, punishment aims at the prevention of crime, including general deterrence (Fiandaca & Musco, 2019, pp. 698 et seq.; Pagliaro, 2000, pp. 665 et seq.; Hart, 1959, p. 6), which refers to all citizens in order to educate them with a sense of respect for state laws (Elezi et al., 2017, pp. 221 et seq.), and specific deterrence, which refers to the prevention of the perpetrator from committing other criminal offences (Hoxha et al., 2019, pp. 515 et seq.; Elezi et al., 2017, pp. 221 et seq.; Muçi, 2012, pp. 262 et seq.; Fiandaca & Musco, 2019, p. 705; Hysi, 2009, p. 56; Halili, 2009, pp. 58 et seq.; Pagliaro, 2000, pp. 673 et seq.). But, at the same time, punishment aims at re-education, re-socialization, and reintegration⁸ of the offender so that the latter can contribute to society in the future (Elezi et al., 2017, pp. 221 et seq.). Precisely, due to the fact that the purpose of punishment is general deterrence, the doctrine states that the use of very harsh or disproportionate penalties in relation to the type of crime can lead to the insensitivity of potential perpetrators (Fiandaca & Musco, 2019, p. 692; Padovani, 1981, p. 262).

On the other hand, the principle of proportionality is also assessed in relation to the re-educational purpose that characterizes criminal punishment. This results from the decisions of the Albanian Constitutional Court. From this point of view, for the re-educational process to be as efficient as possible, the perpetrator of the criminal offence must become conscious of the criminal offence committed and the damage caused, and accordingly, consider the punishment deserved (Fiandaca & Musco, 2019, p. 692; Dolcini, 1979, pp. 18 et seq.; Viganò, 2021, p. 246). Therefore, proportional punishment, which plays a direct role in raising the perpetrator's awareness of the illegal act, is considered a punishment that serves the process of his re-education, re-socialization, or reintegration. Re-education, according to Fiandaca-Musco, does not necessarily imply the deep repentance of the perpetrator as an individual, but the reactivation in this individual of respect for the most important values of social life (Fiandaca & Musco, 2019, p. 693).

⁷ Italian Constitutional Court, Decision no. 236 of 21 September 2016 and Decision no. 68 of 19 March 2012.

⁸ ECtHR, Grand Chamber, *Vinter and others v. the United Kingdom*, Application nos. 66069/09, 130/10 and 3896/10, Decision 9 July 2013, paras. 114 et seq.; General Assembly resolution 70/175, annex, adopted on 17 December 2015; International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 19 December 1966.

At this point, the doctrine states that punishment should consist of a fair reaction to the criminal offence committed (Merlo, 2016, p. 1445). On the contrary, non-observance of the principle of proportionality and application of penalties that exceed the degree of guilt of the perpetrator, even though undertaken in the framework of crime prevention, cannot be considered to have a final purpose (Padovani, 1981; Padovani, 2005, p. 722), but they are considered illegal (Frisch, 2014, p. 168), and damage from the beginning of the re-educational process⁹ (Viganò, 2017, p. 63; Insolera, 2017, p. 190). This position was also held by the Italian Constitutional Court in Decision No. 343 of 1993, where the Court directly refers to the purpose of re-education that characterizes criminal punishment (Merlo, 2016, p. 1445; Ariolli, 1995, p. 33; Fiandaca, 2006, pp. 131 et seq.; Pulitanò, 2016, pp. 641-649; Palazzo, 1998, p. 363). The purpose of re-education of the punishment, in this context, is the one that restricts the legislator's authority when imposing the penalty (Insolera, 2017, p. 190) because the severity of the latter must be adapted to the perpetrator's need for re-education¹⁰.

In this regard, doctrine and jurisprudence assess that disproportionate penalties, on the one hand, do not match the purpose and functions of the punishment, and on the other hand, they affect the discretion of the judge¹¹, who, during the process of individualization of punishment, must adapt the sentence to the social danger of the criminal offence, the degree of guilt of its perpetrator, or the totality of mitigating and aggravating circumstances (Article 47, Albanian Criminal Code) (See Elezi, 2017; Viganò, 2021, pp. 171 et seq.).

According to the jurisprudence of the Albanian Constitutional Court¹², the judgment on the proportionality of the penalty is related to three evaluation criteria: the assessment of appropriateness, necessity, and proportionality in the strict sense (*stricto sensu*) (See Viganò, 2021, pp. 122 et seq.), criteria that have their origins in German constitutional and administrative jurisprudence (See Galetta, 1988, pp. 11 et seq.; Sandulli, 2006, pp. 4643 et seq.; Nicotra, 2015). The first assessment considers the instruments' appropriateness for achieving the final objective¹³ (Viganò, 2017, p. 62).

The assessment of the necessity of the means used refers to the punishment implied as an *extrema ratio* (See Cartabia, 2016, p. 467) since criminal punishment restricts the freedoms and fundamental rights of the individual. As a corollary, the imposition of sanctions should only be done where it is really necessary to protect other fundamental rights and freedoms¹⁴. According to the Albanian Constitutional Court in decision No. 55 of 21.07.2015, for a law to be considered proportional means that it is necessary and appropriate to achieve its purpose:

"A law is necessary in case the legislator has not been able to choose another tool which could be more effective in the same way, but violates fundamental rights to a lesser extent or not at all, and is appropriate when the required result can be achieved with its help¹⁵".

The Court of Justice of the European Union also ruled on the principle of proportionality, but

⁹ Italian Constitutional Court, Decision no. 236 of 21 September 2016; *Id.*, Decision no. 68 of 19 March 2012; *Id.* Decision no. 341 of 19 July 1994 and Decision no. 343 of July 1993; Circular of the Presidency of the Council of Ministers of December 19, 1983, drawn up by a ministerial commission chaired by Padovani, with the aim of determining some criteria for the division in the choice between criminal sanctions and administrative sanctions, published in Leg. pen., 1984, pp. 281 et seq.

¹⁰ Italian Constitutional Court, Decision no. 313 of 26 June 1990.

¹¹ Italian Constitutional Court, Decision no. 179 of 7 June 2017.

¹² Decision of the Albanian Constitutional Court, no. 55, 21 July 2015.

¹³ Decision of the Albanian Constitutional Court, no. 20, 20 April 2021, para. 82: "The Court has consistently held that the principle of proportionality means that the intervention of the legislator to restrict a certain right or freedom is made by appropriate means that respond to the goal that is intended to be achieved."

¹⁴ Decision of the Albanian Constitutional Court, no. 20, 20 April 2021, para. 82.

¹⁵ Decision of the Albanian Constitutional Court, no. 55, 21 July 2015.

regarding administrative measures, stating that:

"In order to determine whether a provision of Community law is in line with the principle of proportionality, it is necessary to assess, in the first place, whether the means used to pursue the goal correspond or not to the importance of the objectives set and, secondly, whether the means mentioned are necessary for its pursuit. 16"

On the other hand, the evaluation of proportionality in relation to the final goal is the most delicate stage of the assessment of proportionality, which entails striking a balance between the penalty that restricts the offender's rights and the benefit to society in terms of preventing similar or different types of crimes (Viganò, 2021, p. 123; Ariolli, 1995, p. 31; Insolera, 2017, 189; Cartabia, 2016, p. 467; Patroni Griffi, 1998, pp. 60-61).

In this regard, we find Bentham's opinion, according to which the harm caused to the perpetrator by the imposition of a penalty can only be justified when it is balanced by the benefits to society in terms of preventing the commission of offences (Bentham, 1780). Consequently, the quantity of punishment provided by law should only be that measure that has a preventive effect without exceeding it.

In this sense, the punishment must be appropriate and sufficient to discourage the offender from committing criminal offences in the future (Bentham, 1780; Ashworth, 2015, p. 84; Frase, 2005, p. 593; Beccaria, 1764). According to this line of reasoning, the most serious criminal offence must be accompanied by a more severe penalty. This affirmation is based on eighteenth-century Enlightenment thought, which includes Beccaria's work *"Of crimes and penalties"*, according to which: *"if an equal punishment is destined for two crimes which unequally offend society, men will not find a stronger obstacle to committing the greater crime if they are united with it, the greater advantage"* (Beccaria, 1764, p. 50). Therefore, the legislator should differentiate the penalties for criminal offences that are characterized by greater social danger (Von Hirsch, 1993, p. 18; Von Hirsch & Ashworth, 2005, pp. 139 et seq.). In this regard, in the Anglo-Saxon criminal doctrine, we find the opinion of Von Hirsch, which divides proportionality into two major categories: *"ordinal proportionality"* and *"cardinal proportionality"* (Von Hirsch, 1985, pp. 39 et seq.; Viganò, 2021, p. 160). According to *"ordinal proportionality,"* penalties are classified based on the social danger of the criminal offence. The proportionality between the criminal offence and the sentence is founded on the concept of equality, and the penalty reflects the social danger of the criminal offence, according to this principle (Von Hirsch, 1985). Furthermore, *"cardinal proportionality"* evaluates the appropriateness of a punishment for a specific criminal offence by balancing the damage caused to the criminal offender by the penalty imposed and the damage produced by the criminal offence (Von Hirsch, 1993; Viganò, 2021, p. 266).

Of particular importance concerning the principle of proportionality are the decisions of the Italian Constitutional Court (See Dodaro, 2012), which, in relation to the principle of proportionality in determining the penalty, refer to the principles of equality before the law (Caterini, 2011, p. 13), the reasonableness of punishment (See Di Giovine, 1995, pp. 159 et seq.; Palazzo, 1998, p. 371; Delli

¹⁶ *European Court of Justice, judgement no. Cause C-118/89 Lingens [1990] ECR I-2637. European Court of Justice, Judgment of the Court (Sixth Chamber) of 21 January 1992. - Otto Pressler Weingut-Weingrosskellerei GmbH & Co. KG v Federal Republic of Germany. Racc., 1983; Cause no. C-118/89, Lingens, Racc., 1990, I, pp. 2637 et seq.; Cause C-155/89, Philipp Bros, Racc., 1990.; In this direction Albanian Constitutional Court no. 20, 20 April 2021, para. 83: "In its case-law the Court, when assessing the interference with fundamental rights, has taken into account the following criteria: (i) whether the objective of the legislator is sufficiently significant to justify the restriction of the right; (ii) if the measures taken are reasonably relevant to the objective, they may not be arbitrary, unfair or based on illogical assessments; (iii) if the means used are not more severe than necessary to achieve the required objective, the greater the detrimental effects of the selected measure, the more important the objective to be achieved, in order for the measure to be justified as necessary".*

Priscoli & Fiorentin, 2008, pp. 3910 et seq.; Riccardi, 2007, pp. 48 et seq.; Patroni Griffi, 1998, pp. 57 et seq.; Anzon, 1991, pp. 31 et seq.), and re-educational function of punishment, respectively, based on Articles 3 and 27, the third paragraph of the Italian Constitution (Italian Constitutional Court, decisions no. 236 of 21 September 2016; no. 68 of 19 March 2012 and no. 341 of 19 July 1994). This Court, regarding Article 3 of the Italian Constitution, refers to the equality test and the reasonableness of punishment in the sense of the prohibition of unreasonable discrimination (Viganò, 2021, p. 237). In this view, the Italian Constitutional Court has expressed the need to treat different situations differently or eliminate the equalization of penalties for criminal offences characterized by dissimilar social dangers (Corbetta, 1997, pp. 139 et seq.; Viganò, 2021, pp. 53-54).

If we refer to the French doctrine, the principle of proportionality must pass constitutional review both in terms of incrimination, security measures, and punishment (Pradel, 2019). Concerning incrimination, constitutional review implies that the laws must be clear in order to avoid imposing arbitrary sentences. Meanwhile, in terms of security measures, they must comply with Article 8 of the Declaration of Human and Civil Rights of August 26, 1789, according to which: "*the law should determine only obviously and necessarily necessary punishments*"¹⁷. Penalties, on the other hand, are subject to constitutional supervision, which implies they must follow the proportionality principle (Pradel, 2019).

In French criminal law, the principle of proportionality should also guide the judge in sentencing. According to Article 132-19, the second paragraph of the French Criminal Code, in the:

*"criminal field, a sentence of unconditional deprivation of liberty may not be given, except in cases when the dangerousness of the offense and the personality of its perpetrator make this sentence necessary and if any other sentence is clearly inappropriate"*¹⁸.

According to the contemporary doctrine, the principle of proportionality represents a fundamental right for the offender, consisting of the right not to be subjected to disproportionate punishments for the criminal offence committed (Viganò, 2021, pp. 226-230), protecting the individual from disproportionate punishments and legislative arbitrariness (Insolera, 2017, p. 208; Merlo, 2017, 1428). This principle is also expressed in Article 49 of the Charter of Fundamental Rights of the European Union, entitled "*Principles of legality and proportionality of criminal offences and penalties*", which in paragraph 3 states: "*the severity of penalties must not be disproportionate to the criminal offence*"¹⁹, considering the latter a basic principle of the European Union. The abovementioned also results from the decisions of the European Court of Justice, which has affirmed that penalties must respect the proportionality principle²⁰.

6. The Principle of Proportionality According to the Albanian Constitutional Court

As previously indicated, the Albanian Constitutional Court stated its opinion on the principle of proportionality with a ruling that differs significantly from the Court's prior orientation²¹, reflecting a step forward in the Constitutional Court's evaluation of proportionality.

Through this decision, the Court has considered a violation of Article 17 of the Constitution, the application of disproportionate sanctions to the criminal offence of manufacture and illegal

¹⁷ Article 8, Declaration of Human and Civil Rights of August 26, 1789.

¹⁸ Art 132-19 al. 2, French Criminal Code.

¹⁹ Article 49, para. 3, Charter of Fundamental Rights of the European Union, Nizza, 2000.

²⁰ European Court of Justice, 21 September 1989, n. 68/88 (Commission v. Grecia), in *Raccolta della giurisprudenza della Corte di giustizia*, 1989, pp. 2965 et seq.; *Id.*, 10 July 1990, n. 326/88 (Hansen), *ivi*, 1990, pp. 2935 et seq.; *Id.*, 2 October 1991, n. 7/90 (Vandevenne), *ivi*, 1991, pp. 4387 et seq.; *Id.*, 8 June 1994, n. 382/92 (Commissione c. Regno Unito), *ivi*, 1994, pp. 2475 et seq.; *Id.*, 26 October 1995, n. 36/94 (Siesse), *ivi*, 1995, p. 3573, point 20.

²¹ Albanian Constitutional Court, Decision no. 55, 21 July 2015, and Decision no. 71, 27 November 2015.

possession of firearms and ammunition, Article 278, paragraphs five and six. At the same time, the Court declared unconstitutional the second paragraph of Article 55 of the Criminal Code, which provides that the final penalty in the case of sentencing for more than one criminal offence is equal to the mathematical sum of all the penalties imposed separately.

In particular, in Decision No. 9 of 26.2.2016, the Constitutional Court considers the allegation that the legislator has violated Article 17 of the Constitution with the changes made by Law No. 144/2013²² in Article 278 of the Criminal Code. These changes, especially in relation to illegal possession of weapons, did not differentiate the punishment for the criminal offence of illegal possession of weapons in public or exposed to the public from other criminal offences in the same chapter, which show an even greater social danger, applying for unlawful possession of weapons a much more severe punishment than the punishment provided for other offences either of the same chapter or other chapters of the Criminal Code.

The 2013 amendments increased the minimum and maximum punishment for the criminal offence of unlawful possession of weapons from 5 to 15 years. This harshening of the penalty was particularly noticeable in the case of illegally possessing ammunition, bombs, mines, or explosives in apartments, vehicles, motorized vehicles, public places, or exposed to the public, for which a penalty of 7 to 15 years was provided.

In the Court's assessment, the principle of proportionality is one of the basic principles of criminal law that must be considered by the legislator. The latter, in determining punitive measures, must find a balance between the need to ensure public and social order or the protection of the public interest and the protection of individual fundamental rights and freedoms, based on constitutional principles and functions that characterize criminal penalties²³, the most important of which is proportionality.

The Court acknowledges that the legislator has the authority to determine the criminal offences and penalties, but he must also adhere to the principle of proportionality (See Bonomi, 2021, p. 203) between the type of criminal offence and the punishment and adapt the penalty to the degree of guilt and to the criminal offence in order to respect the judge's discretion²⁴. In this way, the court has assessed:

"that the penalty is the result of the assessment of the social risk of the criminal offence on the one hand and the degree of guilt of its perpetrator on the other hand. (...) For this reason, criminal sanctions, due to the restrictions they impose on human rights and fundamental freedoms, are provided only for those types of actions or omissions which, following the principle of proportionality, are comparable in importance to the values they protect²⁵".

Precisely for this reason, the Constitutional Court looks at the legislation of other European countries, which for the same type of criminal offence (illegal possession of weapons), have sanctions less severe than the sanctions provided by the Albanian criminal legislation. On the other hand, a proper analysis is done with the Criminal Code itself, referring to the sanctions provided by the same chapter for similar criminal offences.

In general, proportionality is based on several other principles of the rule of law, including the appropriateness, need, and necessity of punishment, where the latter is considered the *ultima ratio* (Al. Const. Court, no. 9, 2016, para. 31).

²² Law No. 144/2013, For some additions and amendments to law no. 7895, dated 27.1.1995 "Criminal Code of the Republic of Albania", amended.

²³ Albanian Constitutional Court, Decision no. 9, 26 February 2016, para. 31.

²⁴ Albanian Constitutional Court, Decision no. 9, 26 February 2016, para. 24, 25.; In the same direction Albanian Constitutional Court, Decision no. 47, 26 July 2012.

²⁵ Albanian Constitutional Court, Decision no. 9, 26 February 2016, para. 25, 48.; Albanian Constitutional Court, Decision no. 19, 01 June 2011 and Decision no. 47, 27 June 2012.

According to the Constitutional Court, the legislator has intervened in the Criminal Code by toughening the penalties for the criminal offence of manufacture and illegal possession of firearms and ammunition with the 2013 and 2014 amendments:

"guided by the public interest, combating organized crime, ensuring public and social order and the effectiveness of coercive measures against perpetrators of criminal offences" (Al. Const. Court, no. 9, 2016, para. 29).

And regardless of the legislator's purpose, the court claims that the frequent changes in the aggravation of punitive measures have breached the principle of proportionality by imposing punishments that are not proportionate to the offence committed. In particular, the amendments provide that the possession of weapons, bombs, mines, or explosives in vehicles or motor vehicles, in public or open to the public, is punishable by 7 to 15 years. According to the Court, this is a disproportionate penalty in relation to the social danger of this criminal offence, drawing a comparison with the illegal possession of weapons in residence, which is punishable by 1 to 5 years. Moreover, the Court compares the punishment provided for this criminal offence with other offences in the same chapter as trafficking in weapons and ammunition, which is punishable by 7 to 15 years (Article 278/a), and the same penalty is also provided for the trafficking in explosives, incendiary, poisonous and radioactive substances (Article 282/a, first paragraph) (Al. Const. Court, no. 9, 2016, para. 53). It's worth noting that the latter represents a higher social risk than illegal possession of firearms in public places.

The Court considers that firearms represent only the means of committing a criminal offence; therefore, the punishment *"for them should be in direct proportion to the nature of the crime committed through their use"* (Al. Const. Court, no. 9, 2016, para. 54). According to the Court, the lack of proportionality that characterizes illegal possession of weapons is highlighted especially by certain types of criminal offences such as homicide committed in profound psychiatric distress (Article 82 of the Criminal Code) or homicide committed in excess of the necessary self-defence limits (Article 83 of the Criminal Code), which carry sentences of up to 8 and 7 years, respectively (Al. Const. Court, no. 9, 2016, para. 54). Furthermore, if compared to other criminal offenses such as intentional murder, which carries a punishment of 10 to 20 years and constitutes a significantly greater social danger than unlawful possession of firearms, the penalty imposed for the latter is out of proportion.

According to the Court, the history of criminal law and experience have demonstrated that toughening criminal punishments has not had a positive influence on the battle against crime or that even when positive consequences have occurred, they have been negligible (Al. Const. Court, no. 55, 2015, para. 24). As a result, the Constitutional Court ruled that in drafting legislation, the legislator should allow the Court to choose a fair and reasonable punishment, effectively repealing the fifth paragraph of Article 278 of the Criminal Code, which is considered contrary to proportionality and legal certainty (Al. Const. Court, no. 9, 2016, para. 62). Problems of constitutionality have also emerged in the sixth paragraph of Article 278, which provides for a disproportionate sentence. Simultaneously, the Court repealed the second paragraph of Article 55 of the Criminal Code, which provides that in the case of a subject who has committed intentional crimes against life in connection with the illegal possession of firearms, the final punishment is equal to the mathematical amount of the penalties defined separately, thus limiting the judge's discretion in individualizing the punishment and assessing all the circumstances surrounding the commission of the offence.

7. Final Considerations

The current trend of increasing the types of criminal offences included in the Albanian Criminal Code and the toughening of criminal punishments has raised the question within the doctrine about whether these measures are effective in preventing crime (Elezi, 2021). This approach contradicts the current tendencies that characterize contemporary criminal law, oriented towards depenalization.

Currently, the re-educational function of the penalty is the focus of doctrine and jurisprudence.

The objective of the penalty, in this view, is not only to punish the criminal offender but also to facilitate his recovery, re-education, re-socialization, and rehabilitation²⁶. This orientation is also supported by the Albanian Constitutional Court's Decision No. 9, 2016, which finds that the excessive penalty affects the perpetrator's re-educational process. In this way, in criminal law, the legislator's observance of the proportionality principle in establishing punishment by adapting it to the type of criminal offence and the degree of guilt of the perpetrator is seen as particularly important. Maintaining this balance would be essential to the re-educational and crime prevention processes.

The principle of proportionality seems to play a restricting role in the political discretion of the legislator (Viganò, 2021, p. 126), forcing the latter to provide the most appropriate punishments in direct proportion to the type of criminal offence. This assessment should be made when the legal framework is being drafted to allow the judge to properly individualize and adapt the penalty to the specific case, respecting the limits of the legal provision and considering the degree of guilt, mitigating, and aggravating circumstances (Viganò, 2017, p. 64; Insolera, 2017, p. 194). Wrong decisions by the legislator in determining disproportionate punishments would further limit the judge's discretion by affecting the process of individualization of the penalty (Viganò, 2021, p. 115).

In conclusion, considering that punishment is the *ultima ratio*, the legislator must choose among the many available means for achieving the criminal law's goal those that infringe as little as possible on individual rights and fundamental freedoms²⁷, enabling the restriction to be proportionate to the objective he seeks to achieve²⁸.

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²⁶ Italian Constitutional Court, Decision no. 179 of 7 June 2017.

²⁷ European Court of Justice, Decision of 16 October 1991, cause no. C-24/90, *Haptzollamt Hamburg - Jonas c. Werner Faust*, in *Racc.*, 1991, I.

²⁸ European Court of Justice, Decision of 1989, cause no. C-331/88, *Fedesa ed altri*, in *Racc.*, 1990, I, p. 4023 ss.; See also ECJ Decision of 5 October 1994, cause reunite nos. C-133-93, 300/93 e 362/93, *Crispoltoni ed altri*, in *Racc.*, 1994, I, pp. 4863 et seq.

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