

Codification of Spanish Criminal Law in the Nineteenth Century A Comparative Legal History Approach

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Throughout the nineteenth century European legal science experienced a profound transformation whose consequences are in evidence to this day. It would be erroneous to think, however, that law reform in Europe originated and developed solely in the nineteenth century. The roots of this transformative process can be seen in the sixteenth, seventeenth, and especially in the eighteenth centuries, the century of The Enlightenment.

Nor should one forget that the transformation of legal science was merely a particular instance of a new way of understanding science and the duty of the scientist in general. It would not be going too far to say that nineteenth-century law reform can only be understood from within the new coordinates of the concept of science, itself an expression of a newly-found understanding of mankind and society.

We do not offer here a panorama of the diverse factors that favored this transformation, nor discuss, as would be necessary, the characteristic traits of nineteenth-century legal science.¹ Rather, we set out briefly the two contraposed concepts of law that emerged in the nineteenth century: the triumph of the codification of a rational law, which subsequently resulted in the definitive abandonment of the old compilations – a technique and tool used until that time for compiling legislation in force that might have been promulgated centuries earlier.

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¹ On this subject, see Javier Alvarado Planas, "Juristas del siglo XIX. De Savigny a Kelsen," in R. Domingo (ed.), *Juristas Universales* (2004), III, pp. 23-57.

In effect, in the nineteenth century, the question arose of whether law is connected to history; the merits of the law in general, and penal law in particular, would feed on history. In fact, the question that arose was: what is law? There were two main positions:

1. one advocated a connection between law and reason (in which case, the law would be the result of purely rational operations);
2. one holding that there was a connection between law and history (in which case, the law would be the result of each group or community's own historical tradition).

On a more profound level, two ways to understand not only law, but even life itself, were at odds:

1. the rationalist conception, which advocated the world of reason, of ideas, of pre-established order, of the system, of deduction, wanted nothing to do with history or tradition because these impeded progress and modernization. According to this conception, law originated from reason.
2. the romantic and historical conception, which defended and exalted the world of feelings, of passion, the spontaneous and the real, what is concrete, tangible and palpable. In short, a world without a pre-established order or system. From this perspective, law logically comes from particular historical experience, from tradition.

This confrontation of concepts endured for an entire century and culminated in the triumph of rationalist theory; this was an accurate reflection of the final result of the dispute between *Jacobins* (rationalists) and *Girondists* (traditionalists) within the framework of the French Revolution (1789).

One of the clearest signs of the triumph of rationalism over historicism was the codification movement. What did it consist of?

The word "code" signified, at that time, much more than a mere collection of rules gathered in a single book, edition or volume. Code meant to approximate in this context, to break with the past, with tradition; to disintegrate the old and incorporate the new. This "new" was not intended to be understood as a mere reform of the old, but rather as an authentic break, as though the "new" had nothing to do with existence up to that moment. This is how some of the protagonists of the movement expressed the position:

... [A] rule in which nothing was worthy of respect, or conservation: no part could be saved for the ordering of future society. All of it, entirely all, needed to be left behind (...) The cart of destruction and reform had to pass through the ruined building, because in it there was scarcely an arch, scarcely a column, that could nor should be saved ... In Spanish criminal law there was only one legitimate and viable system, the system of codification, the system of absolute change.²

The "system of codification, the system of absolute change, was the only legitimate and indeed, the only possible system", affirmed commentator Pacheco, highlighting this identification of "codification" with "absolute change", ideas which were antithetical to "compilation" and "tradition". If criminal legislation contained in the compilations of the modern age represented the law stemming from tradition, of the concrete history of each

² J. F. Pacheco, *El Código penal concordado y comentado* (1848; we use the latest edition: 2000), p. 82.

locality, kingdom or crown, the criminal legislation that constituted the codes responded not to tradition, but rather to reason: to that which the mentality of the time judged rational and reasonable. Considering the historical and the traditional as reactionary and unworthy of modern times, reason would erect the emblem and sign of the (new) modernity.

The codification phenomenon was not another demand of liberal Enlightenment thought, but rather came about as a “postulate of the whole movement”, erecting itself “in the form of a radical renovation”.³ Codification and rationalist Natural Law Theory (*iusnaturalism*) were closely linked concepts. Taking for granted the non-existence of egalitarian conditions in the bosom of society – in reality “it literally overflows with inequality”⁴ – the codification phenomenon presented itself as a final objective in the already secular trend towards legal unification. For the ideologies of the eighteenth century, vehicles for the idea of codification, it is obvious that the objective was not compilatory, but rather reformist and innovative. It was able, thanks to the triumph of the liberal revolutions, to systematically incorporate the new ideas of the Enlightenment thought that had provided a doctrinal body extraordinarily critical of the vanquished authoritarian political systems.

According to Tarello, the modern codification of criminal law was carried out in the late eighteenth and early nineteenth century with the aim of realizing briefly and concisely a system of criminal justice based on three great and elementary principles: (1) the unity of the subject-matter of law; (2) the narrowing of the objects of the criminal law down to two: the public (organization and public order) and the private (life, health and property); and (3) the reduction of punishments to three (death, deprivation of freedom, and financial penalties), of which two were quantifiable.⁵

The codification of criminal law also constituted an ideal tool to hold together a secularized penal law that would satisfy the political and intellectual clamor of the new times, just as it moved on from the definitive abandonment of authoritarian arguments and incorporated the substitution of a systematic method for casuistry.

The intention was to introduce a new law and a new legal science that had nothing to do with the old regime. Nevertheless, one must ask to what extent this aim was achieved. If so, how do we benefit from knowing the history of a criminal law whose natural evolution was broken by the code? Would it not be preferable to leave history behind and begin directly with the study of current criminal law? If this rupture was not achieved, then it is appropriate to question what codification contributed to our current criminal law. Would not, indeed, the study of tradition be fundamental in order to understand the basis for current institutions of criminal law?

All are aware that such an absurd and idyllic result flows from concentrating solely on the rationalist position as much as the historicist, considering that the law always contains something of the rational and of the historical at the same time; one part more static and the other more dynamic; some principles more permanent, others more obsolete. And this responds to the human condition itself, from whose nature emanates some permanent principles and values that can be comprehended in the natural light of reason, and, along

³ Pio Caroni, *Lecciones catalanas sobre la historia de la Codificación* (1996), p. 35.

⁴ Caroni, note 3 above, p. 43.

⁵ Giovanni Tarello, *Cultura jurídica y política del Derecho*, transl. I. Rosas Alvarado (1995), p. 54.

with these, other rules that derive from the culture and idiosyncrasies of each group or society.

It was the analysis of these questions and problems that brought this writer to question the widely shared notion that the codification of criminal law had succeeded in making a clean break with the old traditions.⁶

Anyone with a minimal knowledge of the modern tradition of criminal law knows that current penal law is indebted, in some cases extensively, to ancient traditions, as would be the situation in civil, commercial, or procedural law.

A clear conclusion may be drawn from the foregoing: the study and knowledge of the history of criminal law is not merely for scholarly minds that seek to satisfy their historical curiosity, but rather for lawyers who pursue a worthy understanding of current European regulation. Traditional criminal law doctrine contains many obsolete concepts no longer consistent with modern realities, to be sure. But on occasion trends and concepts long buried by history resurface, acquiring great and undeserved currency.

The reformists saw codification as the only adequate instrument to obtain the desired reforms. They did not realize, however, that analogous to what had occurred in private law, despite all the innovations that the codification would contribute to the "new science", attorneys adhered to the conceptual instruments provided by the Roman-canonical tradition, "and in fact the systematic whole that was constructed of concepts, although re-examined, could only be Roman".⁷ Not in vain has it been said that the main merit of codification was not so much the creation of new figures or principles, "but rather formulation in the category of dogmas, that, in addition, make up a system";⁸ a new systematic made reality thanks to the modern method of rationalist Natural Law (*iusnaturalism*), but based on notions, concepts, figures and principles that came from Roman-canonical Law.⁹

Having considered the principle of codification, we will then turn to the fundamental characteristics of criminal law science of the nineteenth century as crystallized in the legal framework of codification.

From this perspective, it is appropriate to distinguish the political framework from criminal science itself. Under the heading "Enlightenment Thought, Liberal Revolution, and Political-Penal Reformism", we will briefly analyze the fundamental political-penal postulates of Enlightenment thought, whose effective fulfillment was made possible for reasons of political character. Since the political reformist movement had not prospered, most likely it was their character as political-penal principles that had led to a successful outcome.¹⁰ We leave the strictly penal aspect for another occasion, that is to say, the reform of content of a purely scientific nature, which reflects the doctrine as much as the codes.¹¹

⁶ On this question in more detail, see Aniceto Masferrer, *Tradicin y reformismo reformismo en la Codificación penal española. Hacia el ocaso de un mito. Materiales, apuntes y reflexiones para un nuevo enfoque metodológico e historiográfico del movimiento codificador penal europeo*, preface by J. Sainz Guerra (2003).

⁷ C. A. Cannata, *Historia de la ciencia jurídica europea*, transl. L. Gutiérrez-Masson (1989), p. 178.

⁸ J. Lalinde Abadía, *Iniciación histórica al Derecho español* (1983), p. 669.

⁹ Imre Zajtay, "The Permanence of Roman Law Concepts", in V. Gessner, A. Hoeland, and C. Varga (eds.), *European Legal Cultures* (1996), pp. 67-68.

¹⁰ Certainly, here it is consistent to speak of a total rupture between the old and the new orders, a reflection of two totally different political systems, not to say contraposed on certain aspects.

¹¹ In that different frame we can hardly speak of a rupture, as in some aspects there is only one reform, and in others there is a certain (or marked) continuum with the tradition of *ius commune* science.

Here we do not undertake an exhaustive and detailed analysis of the reform, but present the principal contributions and advances. Nor do we focus on the nineteenth century criminal historiography,¹² presenting the great currents and scientific schools which existed throughout that century, as this subject has been satisfactorily addressed by Sánchez González.

ENLIGHTENMENT THOUGHT, LIBERAL REVOLUTION, AND POLITICAL-PENAL REFORMISM

The evolution of criminal legal science can only be understood by recognizing its fundamental point of departure: the intimate link between Enlightenment thought, liberal revolution, and political-penal reform. One must not forget that scientific criminal reformism was only possible after the advent of the liberal State, the political regime that permitted the incorporation of new criminal and political principles that would constitute the foundation of the new criminal science.

At the outset, it seems logical to briefly analyze the triad “Enlightenment thought, liberal revolution and political-penal reformism”.¹³

In the legal field the Enlightenment movement implied the rationalist *iusnaturalism*, a staunch advocate of a social ethic in accordance with nature, crystallized in a law (the natural law) that could conflict with positive law. “The axis of the new methodology” stated Cannata, “resided in the rejection of the principle of authority that had characterized the Middle Ages”.¹⁴

It was precisely the humanitarianism of the Enlightenment that, acting according to postulates emanating from the French Revolution, demanded certain reforms that Lalinde synthesized into six: the legality of crime and punishment, the proportionality between crime and punishment, the individuality of punishment, favorable decision, favorable interpretation, and the presumption of innocence.¹⁵ Such reforms would have been carried out with difficulty but for the triumph of the liberal revolutions, itself reliant on the creation of political conditions favorable to penal reform. In this sense, crucially, particular penal reforms did not constitute true victories of the codification movement because the majority of these principles were defended by the doctrine of *ius commune* and, consequently, were not a discovery of the new penal science rooted in Enlightenment thought.

In this sense the “merit” of the Enlightenment was more or less opportunism, for the Enlightenment offered a doctrinal platform for the political-penal reform at a moment when, given the pace of political triumph, these achievements could effectively be

¹² On this point, see the works of Baró Pazos, “Historiografía sobre la Codificación del Derecho penal en el siglo XIX”, in *Doce estudios de historiografía contemporánea* (1991), pp. 11-40; Clara Álvarez Alonso, “Tendencias generales de la historiografía penal en España desde el siglo XIX”, in *Hispania. Entre derechos propios y derechos nacionales. Acti del'incontro di studio Firenze-Lucia* 25, 26, 27 maggio 1989. *Per la storia del pensiero giuridico moderno* 34/35 (1990), II, pp. 969-984; Aniceto Masferrer, “El *ius commune* en la historiografía penal española. Una apuesta metodológica de apertura hacia lo supranacional y europeo”, in O. Condorelli, E. Montanos-Ferrín, and K. Pennington (eds.), *Studi in Onore di Manlio Bellomo* (2004), III, pp. 563-587.

¹³ For a wider consideration of this question, see Masferrer, note 6 above, pp. 69-91.

¹⁴ Cannata, note 7 above, p. 173.

¹⁵ Lalinde Abadia, note 8 above, p. 669; on the presumption of innocence in Enlightenment thought and its roots in glossators' doctrine, see Joachim Hruschka, “Die Unschuldsvemutung in der Rechtsphilosophie der Aufklärung”, in *ZStW*, CXII (1990), Heft 2, pp. 285-300.

introduced in legal enactments. Thus began a new legal-penal era that justifies being referred to as modern criminal science. Equally it stands in stark contrast to a previous criminal science that, constrained by absolutist political systems, belongs to a completely distinct era, i.e. the old regime.

ORIGINS OF ENLIGHTENMENT POLITICAL-CRIMINAL THOUGHT IN EUROPE AND SPAIN

The influx of Cartesian thought (1596-1650) marked a new stage in European legal culture. On the basis of deductive reasoning as a method, there emanated from the concept of the rational and social nature of humanity and the structuring of a system of values and principles possessing universal validity a “positive law” which had to be judged and justified by these values and principles. The rational *iusnaturalism* so considered abandoned the medieval doctrine of *ius naturale* and created a new law, using for that purpose the experience of history and the materials of the *Corpus iuris* in order to formulate a rationally-based legal system.

The “iusrationalism”, or rational law, closely linked to the wider intellectual and political movements of the Enlightenment, dominated in European thought of the eighteenth century. Although it took different forms in England, France, and Germany, the intellectual attitude of rational criticism of the social and legal order of that time was not regarded as unusual.¹⁶

From the second half of the eighteenth century, Enlightenment thought gave rise to an intense debate throughout Europe —using Tarello’s words— about the “criminal problem”.¹⁷ The main demands of Enlightenment thought in the domain of criminal law merely were concrete signs of the new way of considering the law. In this sense the concern about a more systematic penal law responded to the logical and deductive methodology and the systemic ideal of the new rational legal science. On the other hand, the secularization of penal law, a principal aim of the new penal science, responded to the secularization of society and general law.¹⁸ The humanizing ideal of penal law in this period was also caused by the new social ethics adopted by Enlightenment thought.

These three principles — systematic, secularization and humanization — synthesize the main contributions of Enlightenment thought to penal law. The development and implementation of these principles reflect the important aspects of the nineteenth-century science of criminal law.

Nevertheless, even though humanization had been demanded by medieval and modern doctrine,¹⁹ the humanizing impact of political-penal Enlightenment thought

¹⁶ The iusrationalist methodology in the legal field was subtly cultured first by Hugo Grotius (1583-1645) in the Netherlands, by Samuel Pufendorf (1632-1694), Christian Thomasius (1655-1728) and Christian Wolff (1679-1754) in Germany, and by Jean Domat (1625-1696) in France.

¹⁷ G. Tarello, *Storia della cultura giuridica moderna* (1976), I, p. 383; for developments in Enlightenment thought and penal law, see also pp. 383-483.

¹⁸ For this aspect, see Luigi Lombardi Vallauri and G. Dilcher, “Cristianesimo secolarizzazione e diritto moderno”, in *Per la storia del pensiero giuridico moderno*, no. 11/12 (1981), pp. 1201 ff, where articles on criminal law are collected. The secularization process began in Germany in the sixteenth century, as Sellert has demonstrated: W. Sellert, “Die Krise des Straf- und Strafprozessrechts und ihre Überwindung im 16. Jahrhundert durch Rezeption und Säkularisation”, in *Säkulare Aspekte der Reformationszeit* (1983), pp. 27-48.

¹⁹ The most arguable principle among those mentioned would be that of the humanization criminal law,

is undisputed: the gradual decriminalization of certain criminal assumptions and the reduction of the length of sentences led to the humanizing aim of liberal penal law being achieved, although secularization also was a factor.

Tarello maintains that both aspects, that is, the “amputation of the figures at which penal repression was aimed and (...) the drastic reduction of the instruments for repression” responded to the new demands of codification. In effect, “a brief and systematic body of rules concerning repression was not possible without destroying both the objects and the methods of such repression”.²⁰ Since this formal explanation of the technique of codification is correct, no one is unaware, including Tarello, that the reduction of crimes subject to punishment was also due to the proportionalist ideology, quite widely accepted in the eighteenth century. And the humanitarian ideology favored not only decriminalization, but also had a preference for punishments involving detention and economic penalties.²¹

Strictly speaking, the Enlightenment penalists were conspicuous by their absence in the late eighteenth and early nineteenth centuries. Without dwelling on those who represented the political and penal reformist ideology, we mention the most salient: Cesare Beccaria (1738-1794), Gaetano Filangieri (1752-1788), Giandomenico Romagnosi (1761-1834) and Paul Johann Anselm von Feuerbach (1775-1833) are among them. With the exception of Feuerbach and Filangieri, who can be considered as penalists, the rest were Enlightenment authors who vehemently criticized the current system of criminal law. Before Beccaria there were, among others, Voltaire, Montesquieu, Hugo Grotius, Thomas Hobbes, Samuel Pufendorf, and John Locke. The best-known Spanish figure was Manuel de Lardizábal, who was wrongly known as the “Spanish Beccaria”.

POLITICAL AND LIBERAL REFORMISM AND ITS CONSEQUENCES IN CRIMINAL LAW

The Enlightenment demands for reform in the criminal law, in the short term, would have been useless if the political liberal revolutions had not triumphed. The penal reforms were not only possible due to the new ideas, but also because the political forces which proposed them, once they achieved power, proceeded to dismantle the Old Regime and to open a new era called “liberal”. Here we have the necessary pairing for an effective reform of the old order of criminal law: an Enlightenment thought-liberal State. The concept of code did not necessarily require that the liberal revolution be overcome; some of the early codification tests of criminal law occurred within the framework of non-liberal political systems. An example is the Prussian *Allgemeines Landrecht (ALR)* in 1794. Hence the inappropriateness of the expression “iusrationalist codes”, as codification tests had little

not because the humanitarian theses linked to Enlightenment ethics can be questioned, but rather because this was not a new contribution in comparison with the previous penal tradition, at least with respect to scientific doctrine. To be sure, some jurists from the *ius commune* had considered the importance of humanising punishments, as well as the desirability of proportionality between crime and punishment. According to Lalinde, the *iusnaturalismo* of the sixteenth and seventeenth centuries, developing the theories of Saint Thomas, advocated the need for proportionality between crime and punishment. Lalinde Abadia, note 8 above, p. 667.

²⁰ Tarello, note 5 above, p. 53.

²¹ *Ibid.*, p. 54.

to do with the liberal codes that followed.²² In our view it is better to distinguish between Enlightenment codes and liberal codes.

We turn to the most important reformist achievements in the political-penal field arising from the application by the liberal State of Enlightenment penal ideas. One has to recall that the majority of these reforms happened before codification, although they were later adopted by that process. Some were adopted at the outset, whereas others followed gradually. In any case the effective application of these reforms was possible only within the context of the revolutionary triumphs; without them, the illustrious criticisms would have been useless. The major part of these reformist ideas was not new, although they could be presented as though they were. In previous centuries the legal doctrine of the *ius commune* had laid down a caution, although the legislation of the Old Regime preferred to take other interests into account, disregarding such doctrinal warnings.

(a) Principle of legality

One of the great struggles of the French Revolution for the recognition of the individual rights related to the reform of the criminal law, where Voltaire played an important role.²³ An insistent demand of this Enlightenment thinker was that the criminal laws should be clear and precise, definitively dismissing judicial personal will (it was common the criticism, “*omnae poenae sunt arbitrariae*”). The law had to express clearly the constituent elements of a crime and the punishment. Along with Voltaire, authors such as Mably, Chaussard, Servan, Marat, Carrard, Risi and Vermeil, among others, criticized the system of criminal law and advocated a new system based on legality under which the punishment assigned by a judge could not cross the limits established by the law itself.²⁴

If the rational natural law regarded the law as the only tool capable of fulfilling the proposed legal reorganization, and more specifically, the codification, the principle of legality not only was an individual right of every citizen, but was presented as the only means that was technically appropriate for the new system of criminal law to be established. An inalienable aspect of every code was scrupulous respect for legality, a principle to be reinforced, if possible, in criminal law as the guardian and protector of the most fundamental individual rights.

The first European codes, even when closer to the school of natural law than to French rationalism, left some discretion to the judge for sentencing *ex aequo et bono*: the prussian *Verbessertes Landrecht* (1721), the Swedish Law of the Realm of 1734, the *Codex juris criminalis* of Bavaria (1751) and the *Constitutio Theresiana* (1769) are clear examples. The first European criminal code that established without ambiguity the principle of legality, expressly forbidding both judicial discretion and analogy, was the *Allgemeine Gesetz über Verbrechen und Strafen* of Joseph II (1787). On this point it was more ambiguous than the code known as the Prussian *Allgemeines Landrecht* (1794), because, whereas on

²² Caroni, note 3 above, pp. 69 ff.

²³ A classic work is Eduard Herzt, *Voltaire und die französische Strafrechtspflege im 18. Jahrhundert. Ein Beitrag zur Geschichte des Aufklärungszeitalters* (1887) (reprint, 1972).

²⁴ On this matter, apart from the bibliography in Masferrer, note 6 above, pp. 60, note 120 and 82, note 178, specifically see Bernard Schnapper, “Les peines arbitraires du XIIIe au XVIIIe siècle (doctrines savantes et usages français)”, *R.H.D.* XLI (1973), pp. 237-277; XLII (1974), pp. 81-112; later republished as a monograph (Paris, 1974), the edition we are using.

one hand a principle of legality (*nullum crimen sine lege*) was established, excluding any possible retroactivity of the penal law, on the other hand, the possibility was introduced of punishing offenses that violated rules of natural law, although they were not specifically mentioned in the legal text, thereby undermining the principle of lawfulness.²⁵

The early codes observed, then, the principle of legality without accepting all of its consequences. The Bavarian code of 1813 drafted by Feuerbach did introduce this principle with all of its consequences, thus excluding any possible judicial discretion and analogy. In France, after the code of 1791 had established a regime of legality that was too inflexible with a fixed punishment and abolition of any possible pardon, the 1810 code adopted this principle in a more flexible way, giving judges a legal minimum and a maximum within which they could act. This model was introduced in a number of European countries, Spain among them.

Independently from the fact that long before the nineteenth century the legal science of the *ius commune* had developed ways of binding judicial discretion (later on, the liberal principle of legality), it is undoubted that among of the great advances of criminal law and legal science in that century was the legalization and constitutionalization of this important penal principle.²⁶ The main precept with penal content whose introduction in the normative constitutional framework favored a Copernican turn in the evolution of the existing criminal law, was that of the principle of legality. Apart from the deep historical roots of this principle,²⁷ the reality is that only the triumph of the liberal “revolution” allowed the constitutionalization and the ensuing legalisation of this principle up to its ultimate consequences. The first constitutions and Bills of rights expressly consolidated this principle. Examples include the 1789 Declaration of the Rights of Man and Citizen (Article 8) and the 1791 French Constitution, as well as other European and American constitutions. Later the principle would be expressly consolidated in the 1948 Universal Declaration of Human Rights (Article 11[2]), and two years later in the European Convention for the Protection of Human rights and Fundamental Freedoms (Article 7).

In Spain the principle of legality was included in all the constitutions (1812, 1837, 1845, 1869, 1876, 1931 and 1978),²⁸ although in the text of Cádiz it was not explicit.²⁹

Nowadays the express recognition of the principle of legality remains among the most common precepts of criminal law in European constitutionalism.³⁰

²⁵ Schnapper, note 24 above, pp. 67-68.

²⁶ Masferrer, note 6 above, pp. 75-76 and 111-113.

²⁷ On the history of this principle, see the extensive bibliography in A. Masferrer, “La historiografía penal española del siglo XX. Una aproximación a sus principales líneas temáticas y metodológicas”, *Rudimentos Legales* (2003), p. 5, fn. 199.

²⁸ Only the Constitution of 1812 did not expressly mention this principle, although it can be deduced from the interpretation of certain precepts: Article 9, Constitution 1837; Article 9, Constitution 1845; Article 10, Constitution *nonnata* (1856); Article 11, Constitution 1869; Article 16, Constitution 1876; Article 28, Constitution 1931; Articles 3 and 25(1), Constitution of 1978.

²⁹ On the evolution of this principle in Spanish constitutionalism, see Agustín Ruiz Robledo, “El principio de legalidad penal en la historia constitucional española”, *Revista de Derecho Político*, XLII (1997), pp. 137-169.

³⁰ See, for example, Article 103(2), Constitution of the Federal Republic of Germany, a precept which is clearly related to German constitutional history, as may be deduced from some of constitutional texts: Hessen (1820), Prussia (1848-1850), as well as Weimar (1919), among others.

(b) Notion of proportionality between delicts and penalties

The principle of proportionality between offenses and penalties was a constant criticism by Enlightenment authors of the old penal law. Montesquieu, Beccaria, Bentham, and others in Europe and Lardizábal in Spain favored a new criminal law that incorporated a minimal proportionality between crime and its punishment. Despite the opinions of some jurists of the *ius commune* orientation, this principle was not always respected by legislation, especially criminal legislation of the eighteenth century enacted by the absolute monarchs. Spain is an example. Tomás y Valiente pointed out that the parameters used to measure the severity of sentences often had little to do with the gravity of the offense or the culpability of the offender. Other criteria were involved, such as the repetition of certain criminal behavior, the economic needs of the machinery of justice, and others.³¹

The problem was not the absence of legal doctrine, as noted, which propounded the convenience of proportionality, but a change to a political system willing to act consistently with the principle of elementary justice and common sense.

The effort made by some Enlightenment authors to establish a proportionalist ideology was huge. Filangieri is a good example, as German historiography has recorded.³² According to Tarello, this interest explains the preference for punishments whose numbers were widely divisible and multipliable. To this group would belong penalties such as arrest and bail.³³ Without deprecating the illustrious ideas that advocated proportionality, we must recall that only the advent of the new political system made possible the application of and respect for a principle whose particular importance in the criminal law had been postulated by scholastics.

(c) Principle of individuality and penalties

The disappearance of the transcendent character of certain penalties was among the important contributions of the political-liberal reforms in criminal law. This supported the long-standing criticisms dating from the Old Regime, and later by Enlightenment authors, attacking this institution as damaging to the elementary principle of sentence individualization.

The direct significance of sentences, along with the practice of torture and confiscation of property, were the clearest proof of the backwardness and carelessness of the criminal law of the eighteenth century, which were, as one contemporary author put it, "the blackest pages of contemporary history".³⁴

The only kind of punishment that affected third persons *per se*, unconnected to the perpetration of the crime but directly affected by its punishment, was that of confiscation of property, a punishment which was abolished for this reason. There existed, however,

³¹ Francisco Tomás y Valiente, *El Derecho penal de la Monarquía absoluta (Siglos XVI, XVII y XVIII)* (1969), pp. 359 ff.

³² Kurt Seelmann, "Gaetano Filangieri und die Proportionalität von Straftat und Strafe", *ZStW*, XCVII (1985) Heft 2, pp. 241-267.

³³ Tarello, note 5 above, p. 54.

³⁴ Joaquín Cadafalch y Buguñá, *Discurso sobre el atraso y descuido del Derecho penal hasta el siglo XVIII* (1849), p. 23; see, on the contrary, Virpi Makinen and Heikki Pihlajamaki, "The Individualization of Crime in Medieval Canon Law", *Journal of the History of Ideas*, LXV (2004), pp. 525-542.

another penalty that was not *per se* but only for the punishment of certain crimes, as established by legislation: that the legal status of “infamous” was to be inherited by descendants of the offender. This occurred in connection with the crime of royal treason.³⁵

Lardizábal and other authors of that time seemed to have no doubts about the desirability of abolishing the inheritance of penalties by descendants. In accordance with the unanimous opinion of all Enlightenment attitudes, Lardizábal was totally opposed to the transmutability of the sentence of infamy to descendants of a person convicted of *lesé majesty* (or treason).³⁶

Doctrinal writings unanimously rejected transmutability, demanding its abolition.³⁷ This is expressed in the works of such authors as Gutierrez³⁸ or Elizondo. According to the last, “hence is derived the horror with which the penalty of infamy shall be observed, that it should not be personal, and only with respect to serious crimes, when there is no possibility of reforming the offender and improving his behavior”.³⁹

The personal character of the punishments, which by virtue of the sentence could only be applied to the criminal, was another great principle of criminal law established in constitutional texts, thus definitively abolishing the transferability of the penalty.⁴⁰ The express abolition was so definitively established in the Cádiz Constitution⁴¹ that none of the subsequent constitutions made reference to it.

At the beginning of the nineteenth century, it was uncontroversial that “in a liberal society, according to the principle of individuality and rationality, a punishment should deal with the criminal and have no effect upon his/her relatives”.⁴²

The *Cortes* (parliament) of Cádiz, carrying to the ultimate the idea of safeguarding the family honor, were not content with abolishing such an institution. They also erased the visible and latent effects of its application in the past by way of the Decree of 22 February 1813, which established that “all paintings, pictures or inscriptions showing punishments and penalties, imposed by the Inquisition, that exist in churches, cloisters and convents, or any public site of the Monarchy, will be erased or removed from the places where they are

³⁵ The brief statement of Tomás y Valiente was unwise. He said that “dreadful sentences also affected third persons” (Tomás y Valiente, note 31 above, p. 394). We have shown elsewhere the intrascendent character of the punishment of infamy, which in some situations has been called the “attractive side of the *lesé majesty* assumptions” existing in the Castilian penal tradition of the Old Regime. Aniceto Masferrer, *La pena de infamia en el Derecho histórico español. Contribución al estudio de la tradición penal europea en el marco del ius commune* (2001), pp. 294, 397.

³⁶ Lardizábal y Uribe, *Discurso sobre las penas*, ap. IV, tít. V, 9-10.

³⁷ Antonio Xavier Pérez y López, in his *Discurso sobre la honra y la deshonra legal, en que se manifiesta el verdadero mérito de la Nobleza de sangre, y se prueba que todos los oficios necesarios y utiles al Estado son honrados por las Leyes del Reyno, según las quales solamente el delito propio disfama* (1781), pp. 153-172, still supported maintenance of the punishment of infamy for the descendants of *lesé majesty* criminals, which, according to Tomás y Valiente, note 31 above, p. 110, describes it as “untenable under the rationalist and illustrated precepts”.

³⁸ José Marcos Gutiérrez, *Práctica criminal de España* (1804); we used the 2nd edition: (1819), III, p. 141.

³⁹ Francisco Antonio de Elizondo, *Práctica universal forense de los tribunales de España e Indias* (1784), IV, p. 174; this author, when criticizing the validity of this transcendent effect at the end of the eighteenth century, not only follows Lardizábal’s opinion, but even literally copies it (see pp. 175-176).

⁴⁰ Masferrer, note 6 above, pp. 77-79.

⁴¹ Article 305, Constitution 1812: “No punishment to be given, whatever the crime, should be trascendental in any term to the suffering family, but instead it will have its effect upon he who deserved it”.

⁴² J. Babiano y Mora, and A. Fernández Asperilla, “Justicia y delito en el discurso liberal de las Cortes de Cádiz”, *Antiguo Régimen y liberalismo. Homenaje a Miguel Artola* (1995), II, p. 395.

placed",⁴³ allowing the wounds of those families that had fallen into disgrace by having relatives who were sentenced by the inquisitorial tribunal, to be healed.⁴⁴

(d) Abolition of certain punishments

One evident consequence of the triumph of political-liberal reformism was the abolition of certain punishments, most of them originating in Roman law. They were routinely applied in the criminal law of the Old Regime. The use of the death penalty — or in any case, its excessive use — the confiscation of goods, the punishment of infamy, the transcendent character of certain punishments and the application of torture as a means of obtaining evidence were, without doubt, the main concerns. And opinions which were truly persuasive and decisive about the future of punishment did not emanate from the criminal law strictly speaking, but mainly from the political domain, as one can deduce from liberal comments made at the *Cortes* of Cádiz.⁴⁵

Towards the end of the eighteenth century, in 1776, the famous query of Carlos III to the Council of Castille, submitted through his Secretary of State and the *Despacho General de Gracia y Justicia* (General Office of Pardon and Justice), don Manuel de la Roda, exhibited some concern about these points (proportionality between crimes and punishments; the appropriateness of retaining, reducing or abolishing the death penalty; the rationality of the use of torture as a means of gathering evidence) that were not consistent with the majority views expressed in criminal law doctrine of that time.

Most of these demands did not have an immediate result, but rather sparked the beginning of a process leading to their definitive abolition, which took more time in some instances than in others. We briefly consider the destiny of each punishment.

(d.1) death penalty

The abolition of capital punishment was not achieved until the end of the twentieth century, thanks to Article 15 of the constitutional text of 1978, however much the retention, reduction, or abolition of this penalty was a main component of the famous query of Carlos III addressed to the Council of Castille. It is undoubted that the humanitarian ideology characteristic of Enlightenment natural law made the various criticisms of the death penalty correct even though the ultimate goal was not achieved.

We will not consider here the reasons for this failure. It is enough to recall that not all Enlightenment authors shared the same opinion. The disagreements between Beccaria and Lardizábal on the usefulness of this punishment are a clear example.

(d.2) confiscation of goods

In consonance with the abolition of the transcendental effect of the punishments, the abolition of the only punishment that affected third persons *per se*, despite their being

⁴³ Decreto CCXXV, de 22-II-1813, en *Colección de Decretos...*, vol II, pp. 766-767; cited in Babiano y Mora and Fernández Asperilla, note 42 above, II, p. 395.

⁴⁴ Masferrer, note 6 above, p. 79.

⁴⁵ Babiano y Mora and Fernández Asperilla, note 42 above, II, pp. 387-397.

unconnected with the crime committed, was the confiscation of goods.⁴⁶ This punishment, logically abolished in the Constitution of Cádiz,⁴⁷ had been demanded to be repealed, although in this case later constitutional texts chose, following the prevailing European trend,⁴⁸ to retain this repression.⁴⁹

Disregarding anti-Enlightenment thought and the existence of a minority opposed to such abolition,⁵⁰ the *Cortes* of Cádiz had no doubts about the desirability of abolition. The main reason for abolition was crystal clear to those who drafted the first Spanish constitutional text: “it is not fair that the punishments reach the innocent offspring, the honest relative...”⁵¹

This punishment did not need to be repealed by way of codification, as it had been removed from the Spanish legal order by political and constitutional reforms having an Enlightenment character.⁵²

(d.3) degrading punishments

Punishments deemed to be excessively degrading or humiliating were criticized by some ideological currents of that time, although not until the nineteenth century did the expressions of contempt secure enough support to definitively do away with some punishments or methods of execution that were especially disgraceful.

The penal tradition of the Old Regime had frequently applied such punishments, although practices varied, depending on the peninsular kingdoms.⁵³ Lardizábal's *El Discurso sobre las penas* offers a representative picture of different typologies to classify corporal punishments. This work mentions mutilations, lash strokes, prisons and arsenals, etc...⁵⁴. Whereas Beccaria generally favored the softening of punishments,⁵⁵ Lardizábal expressed a concrete opinion about each punishment. He declared total dissatisfaction with mutilation;⁵⁶ admitted the lash might be applied with “much prudence and common

⁴⁶ For a panoramic history of this institution, from its origins to its abolition in the nineteenth century in peninsular law, see Miguel Pino Abad, *La pena de confiscación de bienes en el Derecho histórico español* (1999).

⁴⁷ Article 304, 1812 Constitution: “Neither shall the confiscation of goods be applied”.

⁴⁸ German constitutionalism is a good example of this tendency, as may be deduced from §16, Constitution of Baden (1818); §105, Constitution of Hessen (1820); §128, Constitution of Kurhessen (1831); and the Prussian Constitution (§9, *oktrojierte Verfassung*, 1848; §10, *revidierte Verfassung*, 1850). Although nowadays constitutions have stopped expressly providing for this prohibition, it can be found in that of Luxembourg (Article 17: “The punishment of confiscation may not be applied”).

⁴⁹ Article 10, Constitution 1837; Article 10, Constitution 1845; Article 12, Constitution *nonnata* (1856); the 1869 Constitution did not expressly contain a prohibition against assigning confiscation of goods, although this might be deduced from Article 13; Article 10, Constitution 1876; Article 44, Constitution 1931. The current Constitution does not contain any such prohibition; in the fiscal field – not criminal – Article 31(1) establishes that “everybody shall contribute to the sustenance of public expenses according to their economic abilities (...) which, in any case, will have confiscatory effects”.

⁵⁰ T. Egido, “Los anti-ilustrados españoles”, *La Ilustración en España y Alemania* (1989); the contrary trend can be found in Gutierrez, note 38 above, III, cap. 6, 103.

⁵¹ *Diario de Sesiones de las Cortes Generales y Extraordinarias. Legislatura de 1810 a 1813* (1870), IV, 437, p. 2419; Pino Abad, note 46 above, pp. 392 and 406; M^a Paz Alonso Romero, “Aproximación al estudio de las penas pecuniarias en Castilla (siglos XIII-XVIII)”, *AHDE*, LV (1985), p. 14.

⁵² Masferrer, note 6 above, p. 81.

⁵³ For a wider view, see *ibid.*, pp. 81-86.

⁵⁴ Lardizábal, note 36 above, cap. V, III.

⁵⁵ Beccaria, *De los delitos y de las penas*, cap. 27.

⁵⁶ Lardizábal, note 36 above, cap. V, III, 1-6.

sense”;⁵⁷ public shame if this did not offend “timidity and decency”;⁵⁸ and suggested that jails and arsenals be replaced by houses of correction, although he accepted the use of jails for criminals who had an “absolutely perverted will”.⁵⁹

Lardizábal seemed to be convinced of the “healthy effects” that this kind of punishment should have; however, he also recognized that an arbitrary and imprudent application could be harmful, as the victim of such punishment could lose the minimal degree of self-esteem and dignity necessary for the positive and well-balanced development of his own personality. Then he gave the specific example of a particular punishment in the *Fuero Juzgo* for the crime of sodomy, which, by the way, was obsolete. Nevertheless, this was not the only example of cruel laws that were abolished by disuse. The expression “lack of use” does not refer to the disappearance of such behavior, but to the fact that judges, when considering crimes whose punishments were excessive, chose to assign punishments consistent with the thinking at those times.

Together with degrading penalties in a broad sense, the punishment of infamy was available at the beginning of the constitutional stage — and since Roman times — and incorporated in the Code of 1822.⁶⁰

The need to reduce the number of punishments was obvious, but its realization was more complex. The utilitarianism of Bentham and the idea of prevention or intimidation intensified the degrading effect and implementation process of some punishments. It has been rightly said that “when speaking of severity, breaks with the past were not the entire picture. In the initial stage of liberalism of the *Cortes* of Cádiz some elements of continuity regarding the Old Regime were included”,⁶¹ and the idea of exemplarity, which required that punishments be publicized, was a sad epilogue to the previous tradition in a liberal political context promoted by modern Enlightenment thought.

A clean break did happen with regard to the abolition of the lash because of the *Cortes* of Cádiz in 1813,⁶² although it should be pointed out that “the disappearance of this punishment was mainly due to disuse of the legal dispositions”.⁶³ Other humiliating punishments were gradually abolished during the codification process.

(e) Abolition of torture as means of gathering evidence

The deliberate abolition of torture in order to extract a confession of the accused, a multisecular traditional practice,⁶⁴ is another example of the political-penal reform carried out before the codification process.

⁵⁷ Lardizábal, note 36 above, cap. V, III, 10.

⁵⁸ *Ibid.*, cap. V, III, 10.

⁵⁹ *Ibid.*, cap. V, III, 16.

⁶⁰ On the abolition of this penalty in historical Spanish law, see Masferrer, note 30 above, pp. 373 ff.; id, “La pena de infamia en la Codificación penal española”, *Ius fvgit. Revista interdisciplinaria de estudios histórico-jurídicos*, VII (1998), pp. 123-176.

⁶¹ Babiano y Mora and Fernández Asperilla, note 42 above, p. 396.

⁶² *Ibid.*, p. 394; on the validity and application of the lash in modern times, as well as its definitive abolition, see P. Ortego Gil, “Algunas consideraciones sobre la pena de azotes durante los siglos XVI-XVIII”, *Hispania*, LXII/3, nm. 212 (2002), pp. 849-906; to the first formal abolition of this punishment in the *Cortes* (1813), one has to add successive ones. See Ortego Gil, *ibid.*, p. 903).

⁶³ *Ibid.*, p. 903.

⁶⁴ For details and bibliography, see Masferrer, note 6 above, pp. 86-89.

It does not seem necessary to dwell on such a well-known matter, and it is not appropriate to present opinions from both sides as historical background. Accordingly, we are interested neither in the arguments used by Acevedo and Pedro de Castro in their fierce dispute about the usefulness of its application.⁶⁵

In Spain Lardizábal merely repeated the arguments of Beccaria,⁶⁶ justifying the complete rejection of this practice, which had been extensively used in Spanish criminal procedure. Both authors agreed on this,⁶⁷ and therefore, on the proposal for abolition. The same coincidence of views occurred in other countries, sometimes even before Beccaria's criticism.⁶⁸

The abolition of torture first happened in the Constitution of Bayona (Article 133),⁶⁹ and later in the *Cortes* of Cádiz, due to the passage of a decree concerning abolition on 22 April 1811 whose substance remained concisely stated in Article 303 of the constitutional text: "Torture and pressure shall never be used".

It has been already noted that such abolition would have been really difficult – if not impossible – without the triumph of liberalism, which in that pre-codification stage introduced criminal law reforms supported by Enlightenment thought (although from a comparative perspective, before liberalism reforms were already taking place in the legal practise and even legislation of many countries, such as Prussia and Sweden⁷⁰). This is evidenced by the fact that the campaign against torture was useless in the reign of Carlos III, who, having been able to proceed towards abolition, proved to be "more of an absolutist Monarch than an Enlightenment one".⁷¹

While criticisms were addressed against torture and not against the whole system of criminal procedure, this was not the fundamental reason for the failure to heed such criticism.⁷² Any criticism that was not consistent with the trends and structures characteristic of the absolutist political regime was pointless. If the absolutist system and

⁶⁵ A. M. Acevedo, "De reorum absolute abiecta crimina negantium apud equuleum..." (1770), later translated and published under the title *Ensayo acerca de la tortura o cuestión de tormento; de la absolución de los reos que niegan en el potro los delitos que se les imputan, y de la abolición del uso de la tortura, principalmente en los tribunales eclesiásticos* (1817); P. de Castro, *Defensa de la tortura y Leyes patrias que la establecieron, e impugnación del Tratado que escribió contra ella el Dr. Alfonso María Acevedo y su autor D. Pedro de Castro* (1778).

⁶⁶ Lardizábal, note 36 above, pp. 266-267.

⁶⁷ We do not share the opinion of Saldana ("Historia del Derecho penal en España", *Tratado de Derecho penal*, de Franz von Liszt (1926), p. 412), who states that "Lardizábal also copies from Beccaria and quotes Montesquieu. Is the less interesting part of his book". Lardizábal tackled this punishment with more accuracy and depth than Beccaria.

⁶⁸ G. Jeruschek, "Thomasius und Beccaria als Folterkritiker. Überlegungen zum Kritikpotential im kriminalwissenschaftler Diskurs der Aufklärung", *ZStW*, CX (1998), Heft 3, pp. 658-673; the author of this article states: Beccaria's argumentative discourse against torture not only lacked originality, but it could possibly be extracted from the works of previous authors.

⁶⁹ "Torture is abolished; any severity or pressure that could be employed in the act of imprisonment or in arrest and execution which is not authorized by the law, shall be a crime".

⁷⁰ On this matter, see Heikki Pihlajamaki, "The Painful Question: The Fate of Judicial Torture in Early Modern Sweden", *Law and History Review*, XXV (2007).

⁷¹ Masferrer, note 6 above, pp. 87-88; Tomás y Valiente, "La última etapa y la abolición de la tortura judicial in España", en *La tortura en España* (2d ed., 1994), p. 135.

⁷² We partially agree with Tomás y Valiente when he says that "if the arguments which were put forward during the XVI, XVII centuries and the first half of the XVIII century against torture did not achieve the abolition or merely the reform of this institution, this was because they were addressed against it in isolation and not against the entire system of criminal procedure where torture was a basic and innate element". Tomás y Valiente, note 71 above, p. 123.

entality decisively contributed to the degradation of procedural guarantees,⁷³ it is logical that criticisms of the system were in vain unless political reforms were introduced.

If we add the fact that in practice torture had been in disuse since the second half of the eighteenth century, it is understandable that the *Cortes* of Cádiz decided to abolish it without any problem.⁷⁴

Criminal Law Science and Nineteenth-Century Codification

Having pointed out that the principles of systematization, secularization, and humanization synthesized the main contributions of Enlightenment thought in new criminal law doctrine and legislation, we may logically conclude that the normative and doctrinal development and implementation of these principles precisely reflect the most important aspects of penal science in the nineteenth century, which we will now address.⁷⁵

The first advances in penal science of the nineteenth century can be included within the framework of these three notions: systematization, humanization, and secularization, although not all of them witnessed the same evolution. We will discuss, with specific examples, the most important advances in the new science of criminal law crystallized in the same codes.

Systematization

Concern about a more systematic criminal law arose from the logical-deductive methodology and the systematic ideal of the new rationalist legal science. Despite the systematic tendency that the science of *ius commune* experienced in the sixteenth and seventeenth centuries, there is no doubt that this could not proceed further because it encountered the inherent limitations of its own methodology. Despite this, and the lack of studies on this matter, the degree of abstraction and systematization that was reached by some peninsular jurists in the seventeenth century is remarkable.

Systematization was the most original contribution of nineteenth century criminal law doctrine. We recall the opinion of Lalinde, who declared that the main merit of codification was not the creation of new figures or principles, “but its formulation in categories of dogmas, that, besides, make up a system”.⁷⁶ This new system would later be used (in the early twentieth century) by doctrine to formulate the, at that moment, modern⁷⁷ theory of crime as a typical, illegal, guilty and punishable act.

Thus we affirm here how criminal law codification is a link between two apparently contradictory sciences of criminal law: the old science of the *ius commune* (fourteenth-eighteenth centuries) and modern dogmatics (twentieth century).

The standard historiographical vision of an absolute split between the old science of criminal law and the one originating in the codification period, which has succeeded in suffocating any possible interest of modern criminal law specialists in the historical

⁷³ V. Ferro Poma, *El Dret Públic Català. Les institucions a Catalunya fins al Decret de Nova Planta* (1987), p. 375, note 381.

⁷⁴ Babiano y Mora and Fernández Asperilla, note 42 above, pp. 393-394.

⁷⁵ See notes 18ff., and their corresponding main texts.

⁷⁶ Lalinde, note 8 above, p. 669.

⁷⁷ On the “modern” character of the science of criminal law, see Masferrer, note 6 above, pp. 218-221.

origins of modern institutions, is rooted in the derogatory assessment of the old doctrine by Enlightenment thought (eighteenth century) and the emergence of modern dogmatics (twentieth century) on the basis of the first systematizing effort that constituted the codifying process. The general theory of crime as a typical, illegal, guilty and punishable act; the division between the General and Special Part, and so on, did not seem to allow for any link between the modern and the old science of criminal law. But this overlooked the fact that in the same way the systematizing effort of the codification process later allowed modern dogmatics to arise, the science of codification of the criminal law did not simply arise, but, along with new elements that represent in some aspects the breaking from the previous tradition, others coming from the multiseular European tradition were drawn upon. Some form the basis of certain modern categories of criminal law.

Division between General Part and Special Part

The distinction between *Parte General* and *Parte Especial* was without doubt one of the major achievements of the codification process. The penal legislation of the Old Regime never drew this distinction, and possibly the Prussian *Allgemeines Landrecht (ALR, 1794)* – according to some – was the only European normative code predating the codification movement that made this distinction.⁷⁸

Other authors, on the contrary, wisely state that “it is not until the moment when the principle of equality is established, and that only happened with Napoleon (...),⁷⁹ when we can speak of general parts; until that date – and in that sense the *ALR* is a very good example – the need to take into account the privileges of each estate had provoked the impossibility of formulating some common principles (...). General Part and equality were, in that sense, in a relationship of direct dependence. The lack of application is what leads to, for instance, the General Code for the Prussian States having more than seventeen thousand precepts, whereas the Code Napoleon only had two thousand”.⁸⁰

In the Spanish legal tradition, as in other countries, criminal legislation considered in connection with particular crimes those circumstances that might hinder possible criminal responsibility. Self-defense is a paradigmatic example of this undeniable fact, but not the only one. Both in the *Partidas* and the *Fuero Juzgo*, the Royal law and the Compilations clearly are examples of this typical aspect of the legal and penal tradition of the Old Regime.⁸¹

Not until the 1822 Code would Spain have a General Part. However, there was a long period between achieving a perfect synthesis of the general principles set out in Book I and the various specific matters set out later. The same happened with the German codification, according to Finke.⁸²

⁷⁸ There is no unanimity in doctrine about this matter, as has been stated by Fco. Javier Alvarez García, in “Relaciones entre la parte general y la parte especial del Derecho Penal (I)”, *ADPCP*, XLVI (1993), f. III, pp. 1021-1023; also see Masferrer, note 6 above, pp. 114-117.

⁷⁹ Álvarez García, note 77 above, p. 1023.

⁸⁰ *Ibid.*, pp. 1023-1024.

⁸¹ *Partidas* 7, 8, 2; FJ 6, 4, 6; FR 4, 17, 1; Ordering of Alcalá 22, 2; NR 8, 23, 1 y 4; NoR 12, 21, 1; etc.; a brief - but suggestive - survey of these principles in the *Partidas*, can be seen in E. Gacto Fernández, “Los principios penales de las *Partidas*”, *Rudimentos Legales*, III (2001), pp. 21-42.

⁸² M. Finke, *Das Verhältnis des Allgemeinen zum Besonderen Teil des Strafrechts*, p. 5.

But the same cannot be said about the doctrinal tradition. Although the systematizing attempt of Castilian legal doctrine never was satisfactory,⁸³ some European authors, associated with humanist jurisprudence and influenced by a “clear tendency toward systematics”,⁸⁴ did succeed in establishing this distinction in the sixteenth century. And this, despite its rudimentary development in some aspects, established an inadmissible precedent – a conclusion drawn by both the natural historical and the penalist doctrines.⁸⁵

The fact that we do not find a correct division between the General and Special Parts until the eighteenth century, dogmatically established due to the deductive method of rationalist iusnaturalism, does not justify in any way ignorance of the important contributions made by authors of the *ius commune* such as Decianus and Theodoric,⁸⁶ although their doctrine was never to be represented in the normative field. At least it is inadmissible to state that the division between General and Special Part was a discovery of Enlightenment thought, with no precedent.

However, a great merit of the codification process was the definitive normative or legal capture of such a division, doctrinally suggested three centuries earlier by jurists of a humanist orientation.

The fact that since the codification movement some institutions have been incorporated in the General Part does not prevent us from examining the historical evolution before codification, although we would have to consider in that case the change that could occur with such incorporation.

The modifying circumstances of responsibility are a specific example. When the specialist Montanos first defended the nonexistence of aggravating circumstances in historical law, she was not stating that the Spanish tradition did not take into account, for instance, madness or intoxication, etc., but that these elements, which in the codification process would be known as modifying circumstances of criminal responsibility (called excuses, aggravating, and attenuants), in the old tradition were qualifying or constituent elements of the crime itself.⁸⁷

⁸³ Although one would want to value in a positive way the systematising effort of authors such as Alfonso de Castro or Covarrubias (E. Cuello Calón, *Derecho penal* (1937), I, vol. I, pp. 187-189), we must admit that the results of their efforts were not comparable to those obtained by the modern penal science (Tomás y Valiente, note 31 above, pp. 118, 123, 126, 128, 133, 150).

⁸⁴ Tomás y Valiente, note 31 above, p. 118.

⁸⁵ Friedrich Schaffstein, *Die Europäische Strafrechtswissenschaft im Zeitalter des Humanismus*. (1954); transl. J. M^a. Rodríguez Devesa, *La Ciencia europea del Derecho penal en la época del Humanismo* (1957); although we have worked with both versions, we quote the Spanish version, pp. 95-96 and 137 ff.; Tomás y Valiente, note 31 above, p. 119; Álvarez García, note 77 above, pp. 1021-1024.

⁸⁶ Schaffstein, note 84 above, pp. 95-96 (Decianus) and 137 ff. (Theodoric); on the contribution of Decianus, see id, “Tiberius Decianus und seine Bedeutung für die Entstehung des Allgemeinen Teils im Gemeinen deutschen Strafrecht”, in *Abhandlungen zur Strafrechtsgeschichte und zur Wissenschaftsgeschichte* (1986), pp. 199-226.

⁸⁷ The nuance or the distinction is important, but two risks of fatal consequences can arise. The first would be to run aground merely in the terminology, and the second to establish an insurmountable abyss between the valid and the historical law. It does matter to speak of aggravating circumstances —using the dogmatic technology — as long as the expert is sure about from what moment this terminology is used and to what extent this institution was altered since? If one acts with due care, we do not see any objection to the reasonable use of this methodology, as long as the legal reality of the historical moment that is being study is not damaged. Thus, we consider accurate the statement of that “there is not any doubt about the numerous advantages and lack of inconvenience that a knowledge of the historical precedents offers in a legal branch for the best analysis and dogmatic understanding of its real content. Cicero already said that History is the teacher of Life”. L. Polaino Ortega, “Eugenio Cuello Calón como contribuidor a la historia de la penología”, *ADPCP*, XVI (1963), f. III, p. 614.

Crime: concept and classes

The modern concept of crime as a typical, illegal, guilty and punishable act emerges at the turn of the nineteenth and twentieth centuries, being linked with the names of Von Liszt and Beling, but its integral elements are not so recent. Some were introduced by the science of the *ius commune*, and later integrated by the codification movement. It would not have made sense to distinguish in different fields the distinct elements of the actual concept of crime, not least because this complex dogmatic idea is beyond even the nineteenth-century codification process. But we will point to those which originated in the *ius commune* and were later incorporated in the early codes, for some still exist in the foundation of criminal law dogmatics.

Although the medieval and modern jurists did not shape a general theory of crime,⁸⁸ it is well known that their subjective notion, that is, the requirement of guilt in criminal behavior, comes from canon penal law⁸⁹ and remains in all European criminal systems.⁹⁰ This is clear evidence of continuity. Whereas today “penal doctrine distinguishes in crime two fundamental elements called illegality and guilt”,⁹¹ one must recognize the Roman and canon origins of these precepts; perhaps not in the denomination, but in their content and semantics, as penalist doctrine itself does.⁹²

The various modern theories of imputation have their origins in canon law doctrine. If the guilty element had fundamental importance in Roman-canon penal science, it is not unexpected that the concept of individual responsibility prevailed, that is, that punishment should be assigned only to the criminal, another fundamental feature of the criminal law in force,⁹³ a contribution of the *ius commune* doctrine,⁹⁴ and later incorporated in the codification. Eventually, criminal intent or indirect will, a completely modern notion, was the object of meticulous study by secular and canon doctrines in modern centuries.⁹⁵ Other aspects elaborated by canon doctrines which, when incorporated by the codification

⁸⁸ Tomás y Valiente, note 31 above, p. 208; see, however, the contributions of early jurists in this sense as deduced from the work of Schaffstein, note 85 above, p. 211 ff.

⁸⁹ On this question, see the rigorous work of S. Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX.* (1935); and works cited in Masferrer, note 6 above, p. 118, note 311.

⁹⁰ See, for instance, the Articles 5, 10, 19 and 20, Spanish Criminal Code; Articles 42 and 43, Italian Criminal Code; and Articles 15, 17-21, German Criminal Code.

⁹¹ Ángel Torío López, “El concepto individual de culpabilidad”, *ADPCP*, XXXVIII (1985), p. 285. This author recognises at least that the principle “there is no punishment without responsibility” has been “progressively enriching history”, a poor statement, but minimally open to the realities of the secular and canon traditions.

⁹² “The penal law of the Church and canon law introduced into their penal concepts of that time a deep spiritual sense that gave a considerable subjective value to the concepts of imputability, crime and punishment, giving birth to new ideas about responsibility, creating the criterion of moral responsibility. Canon law fought strengthening the administration of public justice on the basis of private vengeance and proclaimed the prosecution of crime is a duty of the prince and the judge. (...) thus canon law contained the seed of the differently-structured theories to justify the grounds of the right to punish” See Cuello Calón, note 82 above, pp. 73-74.

⁹³ Articles 27-31, Spanish Criminal Code; and Articles 25-27, German Criminal Code.

⁹⁴ The principle *licite punitur quis sine culpa sed non sine causa* also had validity in old canon law according to Marian Zurowski, “Die Erstreckung der Strafsancktion auf nicht schuldige Personen, die zum Straffälligen in Beziehung stehen, nach der Lehre der Dekretisten und Dekretalisten”, en *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung*, LIX (1973), pp. 175-190.

⁹⁵ Tomás y Valiente, note 31 above, pp. 307-310; Luis Jiménez de Asúa, *El pensamiento jurídico español y su influencia en Europa* (1958), p. 69; Kuttner, note 88 above, pp. 47 ff. and 81 ff.

movement, contributed to the rationalization of criminal law are the principles *in dubio pro reo*⁹⁶ and *non bis in idem*.⁹⁷

According to Rodríguez Devesa, “in all our codes and drafts was included, as an essential element, willfulness”,⁹⁸ which shows the extent to which this fundamental principle of criminal law had taken root among jurists.

And what can be said about the classification of crimes?

On this matter the Enlightenment movement had in view the distinction between crimes, offenses, and breaches. Crimes are those that, in principle, violate such natural laws as life; offenses refer to those rights derived from the social contract, i.e. property; and breaches means actions that violate orders of the police. This classification into *crimes*, *délits* and *contraventions* was incorporated in the French Code in 1791 with the aim of capturing not only the different gravity of the crimes, but also their procedural diversity.⁹⁹ This French classification spread throughout Europe. The Spanish codes, however, never incorporated a clear distinction between offenses and crimes; they only speak of grave or less grave offenses or, in any case, only offenses.

The roots of this classification date back to the Roman tradition and later to the *ius commune* (*delicta atrocissima, gravia et levia*).¹⁰⁰ The fundamental difference between the classification of the *ius commune* and that of the codification movement is obvious: whereas the tripartition of the *ius commune* was based in the sort of punishments that the crimes implied, the codification movement – due to the Enlightenment influence – contributed a new classification rooted in the grounds for considering the behavior to be criminal.

Principle of guilt: some concepts and categories

With the High Medieval period left behind, when various signs of objective responsibility still remained, it was from the Low Medieval Age and a result of the influence of Roman-canon doctrine that criminal responsibility began to be based on guilt. This approach legitimates the imposition of punishment. Those provisions that established punishment merely for damaging something, regardless of who the perpetrator was (minor, demented person, or animal), were increasingly obsolete.

⁹⁶ Peter Landau, “Die Bedeutung des kanonischen Rechts für die Entwicklung einheitlicher Rechtsprinzipien”, in H. Scholler (ed.), *Die Bedeutung des kanonischen Rechts für die Entwicklung einheitlicher Rechtsprinzipien* (1996), pp. 36-37; on this notion see Peter Holtappels, *Die Entwicklungsgeschichte des Grundsatzes “in dubio pro reo”* (1965); as well as J. Martínez Val, “El principio «in dubio pro reo»”, *Revista General de Legislación y Jurisprudencia*, XXXII (2d series, 1956), pp. 330-355; see Gacto Fernández, “Los principios penales de las Partidas”, p. 42.

⁹⁷ P. Landau, “Ursprünge und Entwicklung des Verbotes doppelter Strafverfolgung wegen desselben Verbrechens in der Geschichte des kanonischen Rechts”, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung*, LVI (1970), pp. 124-156.

⁹⁸ J. M. Rodríguez Devesa, *Derecho penal Español. Parte general* (10th ed., 1987), p. 339.

⁹⁹ Crimes were province of the *cours d’assies*; offenses are in the domain of *tribunaux correctionnels*, and breaches are province of *tribunaux de police*, with a progressively simplified procedure.

¹⁰⁰ From the *ius commune* comes the distinction between *delicta atrocissima*, *delicta gravia et delicta levia*. The first, also known as *atrociora*, were those for which the gravest punishment (more than simple death) were given; *gravia* (or *atrocía*), were those which had as a consequence the natural or civil death penalty; and *levia*, the ones assigned the remaining punishments.

Responsibility based on guilt not only excluded damage and injuries caused by animals, but also those attributed to people who were mentally ill; they were deemed not to have acted with free will and therefore, the crime could not be imputed to them.

The importance of the subjective element had been identified in the Aristotelian, Augustinian and Thomist doctrines, becoming the core of crime.¹⁰¹ Some medieval legislative texts, among them the *Sachsenspiegel* or *Partidas*,¹⁰² incorporated this idea. Petrus Abelardus was the first to differentiate between sin and crime.

In legal doctrine this subjective notion of crime existed in the works of jurists from the sixteenth century, among them Antonio Gomez,¹⁰³ Pedro de la Plaza,¹⁰⁴ and Covarrubias;¹⁰⁵ and survived into the seventeenth¹⁰⁶ and eighteenth¹⁰⁷ centuries, when in some texts it even becomes law, as in the *Constitutio Criminalis Theresiana* (1769).¹⁰⁸ Rodríguez Devesa logically states that “therefore it is not unusual that we find intent as a definition of crime in the nineteenth century. The opinions of universities and courts on the 1822 Code show to what extent that definition was popular among jurists”.¹⁰⁹

It is impossible to separate guilt from the theory of crime,¹¹⁰ or to divide the idea of guilt from public penal law in the European criminal tradition.¹¹¹ Criminal law doctrine states that “any evolution that followed in penal law establishes the progressive and irresistible reaffirmation of guilt: a definitive means of a theory of imputation that would be subtly studied both in canon and regulatory law, as these legal systems decisively contribute to the “spiritualization” of law for punishing. Then the subjectivist perspective emerged. Any damaging event is not punished by just the material attribution to an individual any more, but only that derived from guilty behavior”.¹¹²

Roman law sharpened “the investigation of the inner and spiritual side of crime, being able to eliminate any form of transitive penalty and collective responsibility, until clearly

¹⁰¹ Tomás de Aquino, *Summa theologica*, II, qu.18, 6: “Actus dicuntur humani, in quantum sunt voluntarii”; Schaffstein, note 84 above, pp. 111 and 175.

¹⁰² Gacto Fernández, note 95 above, pp. 24-31.

¹⁰³ Antonio Gómez, *Variarum Resolutionum Juris Civilis, Communis et Regis* (1552), book III, De Homicidio, n. 30: “...quod in delictis regulariter tria considerantur, scilicet. animus, factum, et delictum, ut per legem sit punibile”; Carlos M. de Landecho, “La teoría jurídica del delito en Antonio Gómez”, *Estudios Penales. Homenaje al P. Julián Pereda en su 75º aniversario* (1965), p. 237.

¹⁰⁴ *Epitome delictorum, causarumque, criminalium ex iure pontificio regis et causa reo, liber primus* (1558), chap.X: «Voluntas distinguit delictum a non delicto et peccatum a non peccato discernit. Delictum siquidem nequaquam potest accidere absque malitia illud committentis».

¹⁰⁵ Covarrubias, *Relectiones II, de homicidio, Init.* n.1: “Delictum aut peccatum committi non posse absque voluntate...Voluntas distinguit delictum a non delicto”.

¹⁰⁶ Matheu y Sanz, *Tractatus de re criminali* (7th ed., 1702) (3rd.ed., 1676), Controversias, XX, 4 (“Crimen contrahitur si voluntas nocendi intercedat»), and XL, 6 («Crimen non in sola voluntate consistit”).

¹⁰⁷ Vicente Vizcaino Pérez, *Código y práctica criminal* (1797), book IV, n. 1: “This Word, crime, is generic, and includes any action, fact, or word executed or said by a healthy and upright man, with criminal intent and malice forbidden under some penalty by a non-repealed law which cannot be excused by any reason or fair motive”.

¹⁰⁸ Article 1, Criminal Code *Theresiana*: “Delictum in genere quid fit. Ein Verbrechen, ist, wenn von Jemaden wissentlich, und freywillig entweder, was durch die Gesetze verboten, unternommen, oder was durch die Gesetze geboten ist, unterlassen wird”.

¹⁰⁹ Rodríguez Devesa, note 97 above, pp. 339-340.

¹¹⁰ Gonzalo D. Fernández, *Culpabilidad y Teoría de delito* (1995).

¹¹¹ Stephan Stübner, *Schuld, Strafrecht und Geschichte. Die Entstehung der Schuldzurechnung in der deutschen Strafrechtshistorie* (2000), pp. 13-20.

¹¹² Fernández, note 109 above, p. 138.

distinguishing the *lato sensu* guilt (imprudence or negligence) of the form of criminal intent, built upon the basis of immoral will".¹¹³

Later "medieval thought contributes to the settlement of the idea of crime, basically through the work of Saint Augustine (*Confessions*), with his idea of sin and punishment in purgatory, the undeniable defense of human free will, as well as his vision of misunderstanding as a defect of will, as an ambiguous option of the individual, carried out during his intermediate freedom";¹¹⁴ in that same period, Thomas Aquinas developed "free will as a condition of responsibility, attributing to reason the ability of recognizing and distinguishing between good and evil. Therefore, before deliberate action, punishment – in itself, a just retribution – is merely a means for promoting the moral aim. Thus, the basis for the elaboration of canon law is improved. This law will defend the inner side of the punishable deed, giving a decisive importance to will (the intention)...".¹¹⁵

In the Modern Period – and within Renaissance thought – authors such as Detianus, Theodoric, and Covarrubias identify "in will the efficient cause of crime, sharpen the notion of *dolus* – '*Dolus voluntatis sit vitium, culpa intellectus et memoriae*' – linking it with a primary theory of action (*actus corporis, causa efficiens*");¹¹⁶ next, with the advent of classical iusnaturalism, other contributions emerged through the works of Hugo Grotius, Thomas Hobbes, Samuel Pufendorf, John Locke, and others.

This is not the moment for analyzing the specific contribution of *ius commune* doctrine or the second scholastic school to this question. This matter has been treated by other studies to which the reader can refer.¹¹⁷ We should point out that the historical roots of the principle of guilt in general, where the distinction between guilt and criminal intent, the *versari in re illicita*, the *actio libera in causa*, etc. can be included, has been studied extensively by criminal law doctrine. In general the important contributions made by *ius commune* have been recognized.

For instance, Rodríguez Devesa, displaying great erudition, discussed in his *Derecho penal español* the origins of these notions. He stated that "here the main merits belong to Roman law, and then to canon law and the Italian jurists of the Middle Ages".¹¹⁸

¹¹³ Fernández, note 109 above, p. 143.

¹¹⁴ Fernández, note 109 above, p. 144.

¹¹⁵ Fernández, note 109 above, p. 144.

¹¹⁶ Fernández, note 109 above, p. 145.

¹¹⁷ See a recent and rigorous study on the evolution of imputation in German doctrine Lucía Martínez Garay, "Aproximación histórica al surgimiento del concepto de imputabilidad subjetiva en la doctrina penal alemana", *Revista de Derecho Penal y Criminología*, no. 8 (2d series, 2001), pp. 34-126; the author uses doctrinal sources from the seventeenth century, although she probes deeply into the earlier period and offers a witty analysis of German historiography.

¹¹⁸ Rodríguez Devesa, note 97 above, p. 473: synthesizing the contributions of the tradition to the modern notion of guilt, he states: "The Aristotelian ideas penetrate through the Stoic school in Roman law. We owe to Roman law, along with the subsequent efforts of glossators and postglossators, the idea of guilt as a basis for criminal-law imputation. The development of logical thought, a product of the scholastics, helps cleanse criminal responsibility of archaic elements of intent that led to assigning punishments to inanimate objects or animals. The categories of *dolus* and *culpa*, the opposite of *casus*, established themselves, as a requirement for being guilty meant that one must have some physical and mental conditions of age (imputability), until these became part of the common heritage of European legislation. The famous decision of Adrian: "In maleficiis voluntas spectatur, non exitus", is repeated in the common law. The old Aristotelian-Tomist thesis is firmly established. This thesis states that any guilt is *culpabilidad de la voluntad* (guilt of will); without a wilful element, an intention of the subject, there is no guilt. Until the last century attention was focused on imputability and the so-called forms, classes, or species of guilt (criminal intent and guilt). Not until the twentieth century do we find an effort to determine which are the common points to those and other integral elements of guilt, a search

The notions of guilt and criminal intent predate codification, for the science of *ius commune*, on the basis of the Roman-canon sources,¹¹⁹ made important contributions to these ideas that are still present in the tasks of the theories of crime and of imputation.

Concept of criminal intent

The complex **concept of criminal intent** (*dolus*) incorporated in the codes of the nineteenth century was not a product of Enlightenment criminal law doctrine in all its classes. It has been satisfactorily demonstrated that the *dolus generalis* was a theory developed by von Weber in order to solve some cases in which the subject does not kill when he/she had the intent to do so, and kills when he/she did not have that intent.¹²⁰ For instance, after having stabbed his victim, and believing him to be dead, one throws the alleged corpse in the river; the victim dies by drowning and not as a consequence of the wounds. The *dolus generalis*, which regarded death as though it was the result of criminal intent, is obsolete.

The *dolus indeterminatus* was also an Enlightenment creation conceived by Feuerbach, according to whom an undetermined intention is assumed and criminal responsibility is assigned according to the given result¹²¹.

However, there exists another class of criminal intent that, elaborated by the doctrine of the *ius commune* on the basis of the Roman-canon sources,¹²² was later incorporated by different codes: the eventual criminal intent (or indirect).

The origins of the theory of *dolus indirectus* have been the subject of different interpretations. An opinion generated in Germany (Engelmann and Schaffstein) states that the notion of indirect criminal intent dates back to Diego de Covarrubias. According to this distinguished jurist, there exists voluntary homicide not only when the agent wants to kill and directly intends death, but also when his or her will intends a fact followed by death.

for essential positive characteristics. The impulse now comes from an attempt to explain a series of cases in which guilt is established, although there is no real willful element in the act that imputes the subject" (p. 433).

¹¹⁹ Regarding the evolution of these concepts in Roman law, we can state that its distinction considered from a psychological point of view as carelessness or lack of skill in the act of a criminal, which appears in the *XII Tables* regarding a guilty homicide, was sharpened every time in the writings of jurists of the Principality as Calistrato (D. 48, 8, 14) or in Martian (D. 48, 19, 11.2), also found within the concept of guilt the *imperitia* that gives rise, for instance, to the responsibility of the doctor as happens in Ulpian (D. 1, 18, 6.7). However, the punishment will be less than if it was a willful crime. In postclassical and Justinian criminal law all cases in which there was no criminal intent were included under the term *casus* (that here had a wider meaning than just a fortuitous case): thus in *Paul. Sent.* 5, 23, 12; C. 9, 16, 1; D. 47, 9, 9; D. 48, 19, 28, 12. They are texts in which the equation *casu id est negligentia* can be found (J. M. Blanch Nogués, "Derecho penal romano: delitos y penas", in www.iustel.com (Materiales para el estudio del Derecho /Derecho romano: date of consulting: 14 March 2003).

¹²⁰ Von Weber, "Über die verschiedenen Arten des Dolus", *Neues Archiv des Criminalrechts (NArchivCrimR)*, VII (1824/25); Windaus, *Die Streitfrage über den "dolus generalis" und die Verantwortung des Kausalzusammenhangs* (1898); Maiwald, "Der *dolus generalis*. Ein Beitrag zur Lehre von der Zurechnung", *ZStW*, LXXVIII (1966), pp. 30 ff.

¹²¹ Anselm Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen Peinlichen Rechts*. (1803), p. 59: "There are two classes of criminal intent, when the result illegally produced is the *exclusive goal* or immediate one that appeals or the criminal intent was *alternatively* aimed at different violations of law of a certain species or kind. That is called *dolo determinado* (*dolus indeterminatus*); this *dolo indeterminado* or *eventual* (*dolus indeterminatus s. Eventualis*)".

¹²² In the principality the assumption of "preterintentional crime" arose when from the criminal behaviour there occurred a more damaging consequence than was planned by the author: for instance, the case of an injury intentionally caused that led over a period of time to the death of the victim because of that injury, in which case the punishment is for manslaughter – not for criminal injury – although this crime is much less grave than when death is intentionally caused (D. 48, 8, 4, 1 y D. 48, 8, 1, 3). Blanch Nogués, note 118 above, in www.iustel.com.

Thus, he who only pretends to injure, but with a hard blow causes death, has committed a *homicida voluntarius*, as his will is directed to inflicting injuries and all the natural consequences that immediately result from them. Will, with regard to the deadly result, can be directed to such result *directe et per se*, or can be directed *indirecte et per accidens*. The direct will in homicide is the *animus occidendi*, and this was for Covarrubias the perfect criminal intent *tunc vere dolum homicidio voluntario perfectum adesse*. When the willful action implies, as an immediate consequence, death, there exists an *indirecta voluntaria occisio*. According to Engelmann, Covarrubias developed the doctrine of the indirectly aimed will to the result so thoroughly that he should be considered to be the true founder of the doctrine of *dolus indirectus*, although he does not mention indirect intent or indirect criminal intent.¹²³ Schaffstein regarded him as the “true founder” of the concept of indirect criminal intent.¹²⁴ This principle thus originates with Diego de Covarrubias¹²⁵, although its idiomatic origins come from Carpzovio.¹²⁶

Pereda later stated that the concept of indirect intent was not original to Covarrubias, but to Saint Thomas, from him through to Antonio Gomez’s doctrine to Covarrubias and Suarez, when this concept became more subjective. This, in his opinion, is a doctrine commonly followed by Spanish researchers of the period.¹²⁷ If this is the case, Feuerbach was wrong when he ascribed to Nettelbladt-Glantzter the concept of criminal intent *indeterminatus o eventualis*,¹²⁸ as Covarrubias and Suarez had preceded him by almost two centuries.¹²⁹

The *versari in re illicita*

On the other hand, the said *dolus indirectus* signified considerable progress in rejecting another principle incorporated by codification at the end of the twentieth century: the *versari in re illicita*. This institution, of canon origin, was adopted by secular penal law under the influence of Italian jurists. It represented a form of objective responsibility, as it attributed under the denomination criminal intent, all consequences, including those unknown or not desired by the subject, when they derive from an illegal act or *animus nocendi*. The formula was: *versanti in re illicita imputantur omnia quae sequuntur ex delicto*.

Concept of guilt and the *actio libera in causa*

The **concept of guilt** incorporated by the codification of criminal law was not a contribution to be only ascribed to Enlightenment thought. Historically, guilt appeared after criminal intent. For more than two centuries different terminology has been used, sometimes to express the same idea. Thus, for instance, in Roman law there existed, on one hand, the

¹²³ Engelmann, *Die Schuldlehre der Postglossatoren und ihre Fortentwicklung. Eine historischdokumatische Darstellung der Kriminellen Schuldlehre der italienischen Juristen des Mittelalters seit Accursius* (1895), p. 107.

¹²⁴ Schaffstein, note 84 above, p. 110; Schaffstein, note 84 above, pp. 170 ff.

¹²⁵ On Diego de Covarrubias (1512-1577), see Schaffstein, note 84 above, 153 ff.

¹²⁶ *Ibid.*, pp. 170 ff.; on this distinguished German jurist, see G. Jerouschek, W. Schild, and W. Gropp (eds), *Benidict Karpzov. Neue Perspektiven zu einem umstrittenen sächsischen Juristen* (2000).

¹²⁷ J. Pereda, *El “versari in re illicita” en la doctrina y en el Código penal* (1948), pp. 149 ff.

¹²⁸ *De homicidio ex intentione indirecta commisso* (Diss.) (Halaë, 1756).

¹²⁹ Cuello Calón, note 82 above, I, p. 446.

culpa lata, considered as criminal intent; and on the other hand, guilt was not juxtaposed to criminal intent, but to the *casus*.¹³⁰ Later the Italians — the real creators of the doctrine of guilt — divided guilt into *lata*, *levis* and *levissima*. Within *culpa lata (magna)* they built the *culpa dolo proxima* as a subspecies of guilt to some, *dolus praesumptus* to others, also considered to be a special type of guilt or pure *dolus*. Also originating with Italian jurists is the denomination *quasimaleficium* applied to guilt,¹³¹ later adopted by the *ius commune*: *delictum verum* was the volitional one, whereas guilt was a *quasidelictum*.

On the other hand, doctrine held at the end of the nineteenth century that the construction of the *actio libera in causa* theory originated from Italian canonists and post-glossators.¹³² Criminal law doctrine still supports this view of the historical origins, according to an exhaustive study of this institution.¹³³ This principle mainly concerned intoxication, a situation in which canon law considered that guilt lay in the fact of getting drunk, so the crime committed in that state was merely the result of a previous illegal act. In contrast, the Italian jurists did not have a standard opinion, although they agreed that a small degree of intoxication was not enough to eliminate guilt, demanding then a *cum exilio mentis* intoxication.¹³⁴ The disagreements among jurists of the *ius commune* about some aspects of these institutions partially explain the later evolution,¹³⁵ full of disagreements caused by the serious doubts that the matter arouses.

Throughout the codification process, there were the most diverse opinions, from those who stated that imputability has to be stated always to those that considered that the subject is responsible in all cases, as well as intermediate solutions, that only accepted responsibility by way of guilt or that believe when we face an *actio libera in causa* there always exists a case for mitigation.

As Rodríguez Devesa points out, “nowadays the prevailing opinion is favorable to the appreciation of a volitional or guilty crime depending on subjects being willfully or guiltily in a situation of not being able to control their acts at the moment of committing

¹³⁰ See Rodríguez Devesa, note 97 above, p. 474.

¹³¹ W. Engelmann, “Rechtsirrtum und Dolus im römischen und gemeinen italienischen Recht”, *GerS*, LXXXVI (1918), pp. 198 ff.

¹³² Engelmann, note 122 above, pp. 30 ff.; also see an Italian study: O. Vannini, “L’actio libera in causa nel nuovo codice penale”, *Studi in memoria del Prof. Pietro Rossi* (1935), pp. 59-75.

¹³³ U. Joshi Jubert, *La doctrina de la “actio libera in causa” en Derecho penal (ausencia de acción o inimputabilidad provocadas por el sujeto)* (1992); German doctrine has dealt more than any others with the historical roots of this institution, as the bibliography collected in Joshi shows; and the Germans are still interested in it according to recent research by Joachim Hruschka, including his “Ordentliche und außerordentliche Zurechnung bei Pufendorf. Zur Geschichte und zur Bedeutung der Differenz von *actio libera in se* und *actio libera in sua causa*”, *ZStW*, XCVI (1984), Heft 3, pp. 661-702.

¹³⁴ Engelmann, note 122 above, p. 30.

¹³⁵ Rodríguez Devesa, note 97 above, pp. 452-453, collects some of the disagreements: “Bartolo y Baldo saw a cause for mitigation, admitting that a *culpouse actio libera in causa*. Others supported impunity, and the majority understood that this could only be punished as the *actio libera in causa dolosa*. Farinacio suggested three possible hypotheses, that is: a) “*delictum in ebrietate commissum, in quo nec dolum nec culpam habet*”; b) “*qui sciens se solitum in ebrietat delinquere et alios percutere ac offendere, non abstinuit se a vini immodica potatione et se inebriavit*”; c) “*ebrietat procurata et affectata ad effectum, ut ebrius delinqueret et delinquendo se cum ea excusaret*”. Farinacio thinks that in the first assumption, following the canon doctrine, there is “*culpa ac levitate*”; in the second, a guilty action, and in the third, an *actiodolose libera in causa*. The oneiric intoxication, sleepwalking and delirium produced by fever are considered in the same way as intoxication. The *dormiens delinques* was compared to the *furiousus* if it could not prevent, taking the appropriate precautions, the damaging consequences. If not, there was responsibility by way of guilt according to the majority of authors, although some pointed to the possibility even of a volitional crime”.

the crime. The subject has also been used as an instrument, so imputability is enough at the moment of the previous action by virtue of becoming an instrument of itself".¹³⁶

Theory of imputation

The theory of imputation, developed within the philosophical natural rationalism the seventeenth century, is a doctrine about assumptions of responsibility for human actions, about the principal ones that rule human behavior and determine the responsibility that for that same behavior corresponds to that of the author. It is also the base from which individual rights are deduced, as well as the principles that set the relationships between people within organizations such as family and State, and, finally, the relationships between States.¹³⁷ The importance of this theory for criminal law lies in the fact that throughout the eighteenth century the European penalists, especially the Germans, incorporated its principles to explain criminal law. This had various consequences. From the formal point of view, it decisively contributed to the systematization of the matter and to the consolidation of a General Part common to different crimes; from a material point of view, it assisted the secularization of criminal law and its incorporation in the political ideas of the Enlightenment. Regarding what we know today as guilt, the criminal law took from the theory of imputation the free will of the human being as a basis of responsibility.¹³⁸

Since the end of the eighteenth century and throughout the nineteenth century imputation, understood as discernment of the existence of a relationship between an external event and a determinate subject as causing the event, becomes a basic concept in German penal doctrine, although its content continues to evolve. On one hand, the German doctrine incorporates the distinctions that natural rational philosophy had been introducing in the concept, mainly the distinction between *imputatio facti* and *imputatio iuris*, and doctrine establishes differentiated groups in the overall assumptions on which imputation depends.¹³⁹ On the other hand, and especially as a consequence of the influence of Kantian philosophy and the division that this imposed in the spheres of law and morals, the ethical content of criminal responsibility was affected. Some authors begin to differentiate freedom in an ethical sense from freedom in the legal sense.

An important concept for penal dogmatics that emerged in the twentieth century linked to the concept of imputation is that of subjective imputability. Even though today the cases explained from this perspective (mental disorders, minority of age, disorders from drugs) had always taken into account these factors to modify criminal responsibility, generally determining its exclusion or mitigation, in the nineteenth century, following the differentiation of diverse types of assumptions of imputation, this series of circumstances moved away from others that also set back or complicated the imputation of criminal

¹³⁶ Rodríguez Devesa, note 97 above, p. 453.

¹³⁷ The first author to introduce the term '*imputatio*' in legal science was Samuel v. Pufendorf. Thereafter a doctrine developed concerning the assumptions of responsibility that constituted the starting point for the remainder of the *iusrationalist* philosophers. See E. Schmidt, *Einführung in die Geschichte der deutschen Strafrechtspflege* (3rd ed., 1965), pp. 169 ff.; H. Welzel, *Die Naturrechtslehre Samuel Pufendorfs: Ein Beitrag zur Ideengeschichte des 17. und 18. Jahrhunderts* (1958).

¹³⁸ See, besides the authors in the previous note, Martínez Garay, note 116 above.

¹³⁹ On the distinction between *imputatio facti* – *imputatio iuris* vid. Hruschka, note 132 above, pp. 661-702.

responsibility. Then these began to be autonomously considered.¹⁴⁰ Nevertheless, the arising of subjective imputability as a dogmatic category with similar content to that which nowadays is recognized did not concern only conceptual evolution within dogmatics. Other factors contributed to the consolidation of psychiatry as a scientific discipline and its involvement in the penal problem. Thus, in Spain, where, unlike Germany, the theory of imputation did not have a major role in the science of criminal law, the concept of subjective imputability also appeared in the nineteenth century as we regard it nowadays, focused on the pathologies of the mental faculties of the active subject of the crime.¹⁴¹

The nineteenth century is also the beginning of the end for imputation as a central concept in the science of criminal law. The progressive emergence of criminal codes encouraged jurists to reconcile principles of Natural Law with positive legislation and, on the other hand, the thought typical of the Enlightenment was being left behind by the positivist paradigm. At the dogmatic level, the consolidation of the action (since the work of Hegelian penalists) and guilt (since Karl Binding) as criminal law concepts, together with the consideration of chance as a main theory of crime, meant the progressive establishment of a different system to explain the criminal responsibility that would culminate at the beginning of the twentieth century in the classic scheme of crime developed by Liszt-Beling, in which this is defined as a typical, illegal, guilty and punishable action, leading to systematics in which the concept of imputation has disappeared.¹⁴² Only in the last decades of the twentieth century has imputation been recovering importance in penal dogmatics, both in the field of typicity – illegality (objective imputation), and the field of guilt (subjective or personal imputation).¹⁴³

Circumstances of crime: self defense

The importance of what today are called “causes of justification” is well known. Although most had been regulated in previous periods by canon penal law and considered by *ius commune* doctrine, especially self- defense, it is interesting to consider their evolution during the codification stage.¹⁴⁴

Self-defense was without doubt among the most developed institutions by the science of criminal law prior to the nineteenth century. Due to developments in Roman-canon law,¹⁴⁵ the science of criminal law in the nineteenth century received the essential requisites

¹⁴⁰ See Martínez Garay, note 116 above, pp. 81 ff.

¹⁴¹ Subjective imputability is first formulated in Spanish criminal law doctrine by Luis Silvela; see J. González, *La imputabilidad en el Derecho penal español: imputabilidad y locura en la España del siglo XIX* (1994); also Lucía Martínez Garay, *Imputabilidad penal y consumo de drogas: revisión del concepto de imputabilidad a partir de algunas de las causas que la excluyen* (unpublished PhD thesis, Valencia, 2004), pp. 219 ff.

¹⁴² The term “imputability” retained from the old terminology merely referred to the mental abilities of the author, with a meaning then very different from that of the theory of imputation.

¹⁴³ Among the main architects of the reincorporation of the idea of imputation in dogmatics (and not the theory of imputation of natural rationalism of the seventeenth century, obviously) are Roxin, Hruschka and Jakobs. On the meaning of imputation in current penal law, mainly focused on objective imputation, see Santiago Mir Puig, “Significado y alcance de la imputación objetiva en Derecho penal”, in VVAA, *Modernas tendencias en la ciencia del derecho penal y en la criminología* (2001), pp. 389-408.

¹⁴⁴ See Miguel Ángel Iglesias Río, *Perspectiva histórico-cultural y comparada de la legítima defensa*, Prologue by Dr. D. Ángel Torío López (1999).

¹⁴⁵ The most important aspects revolved around the requisites required for necessary defense, structured around the generic expression “*cum moderamine inculpatae tutelae*”, introduced by Innocence III in the *Decretales*

that, with but “another orientation”, would configure this institution in the codification stage and today (illegitimate aggression, relevance of aggression and proportionality of defense).¹⁴⁶

How did the codification movement incorporate this institute?

The French Penal Code of 1791 was the first to substitute the old expression “*moderamen inculpatae tutelae*” with “self defense”, and from there moved on to the Code Napoleon of 1810, although both codes curiously placed the institution in the Special Part and not in the General Part. In the second half of the nineteenth century the conceptual structure of self defense reached “technical-dogmatic perfection”, leaving behind the previous casuism. Undoubtedly, “to this it definitively contributed the influence of the doctrines of rationalist iusnaturalism and Feuerbach’s Enlightenment thought that began to approach a general concept of secularized self-defense not exclusively limited to crimes of homicide”.¹⁴⁷

Apart from specific exceptions, “on one hand the European codification movement places self-defense in the General Part (...); on the other hand, the only requisites on which its exercise is conditioned are the illegitimate aggression and defensive necessity”,¹⁴⁸ any reference to proportionality disappearing, and all these requirements coming from *ius commune* doctrines.

As characteristic features of the treatment of self-defense in the codification process, we should mention: (a) its unlimited nature based on the individualistic position that the human being has in society; (b) the structure of self-defense being within the exclusive perspective of the victim and exaggeratedly extolling the rights of the victim, especially freedom and property; and (c) marginalization of the discourse concerning the requirement to escape or avoid unfair aggression.

Such frameworks did not always get off the ground with the same intensity in all countries, as is readily evident when analyzing self-defense in the European codes. In Spain, for instance, although the lack of a requirement to escape prevailed – at least in doctrinal writings – some drafts emphasized the *necessitas inevitabilis* (unavoidable need)

(*De Homicidio c. 18, X*): the current illegal aggression; the *moderamen inculpatae tutelae*, that is, the *modus defensionis*, that constituted “the true innovation” introduced by canon law in self-defense, and the defense of the wealthy goods. Regarding the ethical implication given by canon law to self-defense, this logically ceased with the Enlightenment. Therefore canon law strongly contributed to the later evolution.

¹⁴⁶ The main nineteenth century commentators recognized the substantial contribution of normative sources prior to codification: Pacheco, note 2 above, pp. 169 ff.; Tomás Maria de Vizmanos, and Cirilo Álvarez Martínez, *Comentarios al nuevo Código penal* (1848), pp. 80-82; A. Groizard and Gómez de la Serna, *El Código penal de 1870 concordado y comentado* (1870-1899), I, p. 220, who, considering the demand of illegitimate aggression, says: “The *Partidas* had mentioned it. The natural thing is that every man has the right to defend himself if someone wants to kill him; he has not to wait to be injured, for it could happen that, being the first to be injured, he could die and then he could not defend himself”; and when dealing with the demand of rationality, he stated: “Our legislators questioned themselves about the same thing and agreed on that but insisted on the concurrence of three circumstances: 1. that the burglary was intended to be a robbery; 2. that it happened at night; 3. that the owner wanted to arrest the thief to hand him over to justice and defended himself with weapons. The same answer was given to this question by the laws of *Fuero Real* and the *Recopiladas*, although they did not require the concurrence of the last of the said circumstances; the first two were enough for them to declare not guilty of manslaughter” (p. 228); according to this author, Article 8.4, 1870 Criminal Code agrees with D. 11, 2, 1; C. 9, 14, 2; *Partidas* VII, 8, 2-3; NoR 12, 21, 1.

¹⁴⁷ Iglesias Rio, note 143 above, p. 119.

¹⁴⁸ *Ibid.*, p. 122.

developed by *ius commune* doctrine and “a differential note towards other countries through the requirement of a rational need for the means used”.¹⁴⁹

Therefore, self-defense achieved in the codification period “some aspects better defined and technically refined than in the previous stage. On one hand, a generalized consensus is reached when ascribing to this institution a reason of justification; on the other hand, its field of application embraces the universal defensibility of all goods and rights”.¹⁵⁰ One should add the unlimited character of the defense, typical of the individualist liberal thought which the ideological context of the twentieth century would soften, taking self-defense “to an essentially restrictive destiny”.

Not until the nineteenth century was the controversy about guilt being a reason for justification or exclusion understood. By that time the Special Part was separated in the criminal codes, being definitively linked with the corresponding articles of the General Part,¹⁵¹ although the French Criminal Code kept studying how to regulate crimes against life and bodily integrity.¹⁵² The various Spanish codes of the nineteenth and twentieth centuries retained the regime of self-defense established by the criminal code of 1848 untouched except for some minor reforms in the codes.

Other modifying circumstances of responsibility (exculpatory, mitigating and aggravating) and judicial criteria

The circumstances of the criminal act, which in the codification period were known as aggravating, mitigating or exculpatory and nowadays are still valid, were discussed in earlier normative and doctrinal sources prior to the nineteenth century. Specifically, medieval and modern legal doctrines had pointed to the important role of some circumstances as self-defense: the state of necessity and obedience that today are considered as reasons for justification (within the criterion of unlawfulness), but also age, gender, madness — nowadays “psychic anomaly or alteration” or “transitory mental disorder” — intoxication, backsliding and treachery, among others.

The matter of aggravating circumstances, studied by Montanos at different times, has been controversial but is no longer. Until the end of the 1980s, Spanish doctrine — along with European — agreed that aggravating circumstances had existed in our legal history, considering them to be a clear and direct precedent that would later take on in the nineteenth century, although with some changes, the task of codification.

An early study by Montanos, published in 1989, questioned what the historiography of criminal law took for granted and stated that such circumstances did not exist in the Spanish penal tradition. According to this study, the analysis of peninsular normative sources left little doubt that aggravating circumstances, as they had been considered by codification, did not exist.¹⁵³

¹⁴⁹ Ibid., p. 133.

¹⁵⁰ Ibid., p. 145.

¹⁵¹ The Criminal Code of 1822 still regulated self-defense when punishing manslaughter and wounds or mistreatment caused by acts (Articles 621, 622, 655).

¹⁵² Article 328, Criminal Code of France.

¹⁵³ E. Montanos Ferrin, “La inexistencia de circunstancias agravantes en el derecho histórico”, *RFDUCM*, LXXIV (1988-89), pp. 399-441; republished in his — together with J. M^a Sanchez-Arcilla — *Estudios de Historia del Derecho criminal* (1991), pp. 77-130.

In his initial study Montanos mistakenly focused excessively on normative sources, underestimating and avoiding almost all doctrinal sources. Having examined many normative sources that, in his opinion, demonstrated the nonexistence of such circumstances, when delving deeper into legal doctrine and finding jurists who had specifically mentioned the term “aggravating”, he pointed out that those authors (Antonio Gomez and Matheu Sanz) “ignore legal tradition and distort the concept of the different crimes”,¹⁵⁴ whereas in fact both legislation and doctrine are part of the legal tradition in order to prevent us from falling into the reductionist idea of legislation and making the Spanish tradition of criminal law obsolete.

In the second approach to this question, and on the basis of a rigorous and exemplary search of manuscripts by diverse jurists of the thirteenth century, Montanos, by now free of the methodological prejudices that conditioned his first study, became aware that at an early stage the legal science of the *ius commune* understood the circumstances of crime not as an intrinsic element of criminal behavior, but from an external point of view, as prescribing the degree of guilt of the criminal and the gravity of the punishment to be assigned by the judge using his *arbitrium*.¹⁵⁵ If legal doctrine used this concept of “circumstances of the crime” at such an early moment, it is probable that certain normative sources employed the concept in the same sense. To confirm this hypothesis would require a new study.

Leaving aside the different interpretations that can be based on an analysis of normative sources, it is clear that legal doctrine proves the existence of such circumstances according to the traditional thesis of Spanish doctrine. Following this reasoning, if the glossators of the thirteenth century knew how to separate those circumstances from the criminal behavior itself, it is reasonable to believe that the commentators, those from the *mos italicus* as well as those from the *mos gallicus*, kept to that path. This question also deserves to be subject of further research.¹⁵⁶

A close analysis of the circumstances of the criminal act reveals the connection between these and the judicial award in the Medieval and Modern periods,¹⁵⁷ taking into account that, although the arbitrary penal clause was the main element for the correct selection of the punishment in a particular case, this was done on the basis of the criminal’s guilt. The circumstances were those that better represented the guilty element of the criminal behavior, mostly conditioning the particular criminal responsibility.¹⁵⁸ It is well known that an arbitrary clause of the criminal law provided that, often because of the criminal

¹⁵⁴ Montanos Ferrin, note 152 above, p. 127.

¹⁵⁵ E. Montanos Ferrin, “An de die vel de nocte”, *Rivista Internazionale di Diritto Commune*, IX (1998), pp. 49-80; id., “¿Por qué suena la campana?”, *Rivista Internazionale di Diritto Commune*, X (1999), pp.37-52.

¹⁵⁶ First, one must begin from the idea that jurists from the *mos italicus* (the majority in our legal tradition), despite their affection for the scholastic method based on the case, kept separating the circumstances of the criminal act from the crime. Now – and in this same line – one can think that other Spanish jurists, who did adopt in their *modus faciendi* the typical forms of the *mos gallicus* current (Antonio Gómez, Diego de Covarrubias, and others), probably advanced more in this direction, that is, in considering those circumstances outside the crime. They might have formed a conception considerably closer to that incorporated later by the codification. In this regard, it was important the distinction between ordinary and extraordinary punishment.

¹⁵⁷ Masferrer, “La dimensión ejemplarizante del Derecho penal municipal catalán en el marco de la tradición jurídica europea. Algunas reflexiones iushistórico-penales de carácter metodológico” *AHDE*, LXXI (2001), pp. 463-464.

¹⁵⁸ Hand-Rudolf Hagemann, *Basler Rechtsleben im Mittelalter* (1981), pp. 241-242.

and his or her personal circumstances, identical offences were to be punished by different penalties.¹⁵⁹

Nevertheless, perhaps it is no coincidence that the strictest normative regulation of the mitigating and aggravating circumstances of criminal responsibility coincides with the abolition of the wide discretion which judges had in the Old Regime. In the codification stage the effective introduction of the principle of legality and the subsequent abolition of wide judicial discretion softened the role of the circumstances of the criminal act in assigning a punishment, so that, since then, the range of a judicial decision was enclosed within two well delineated ends, thus alleviating the prominence that such circumstances had until the nineteenth century.

The close relationship between those modifying circumstances and judicial will originated in imperial Roman law, where the judge had to pay attention to the circumstances of means, time, place and the individuals (offender and offended). The *Digesto* (D. 48, 19, 16) reduced them to seven: *causa, persona, loco, tempore, qualitate, quantitate* and *eventu*. All of them had to be taken into account when assigning a more or a less serious punishment. This doctrine of the *ius commune* (seventeenth century) was the first attempt to take general account of circumstances separately from the particular crimes, although many reasons for mitigation systematically set out had been already developed by the postglossators.¹⁶⁰ After the Modern Period, doctrine did not overcome this approach. In practice the judge had complete discretion when assigning punishments.¹⁶¹

The French Revolution, as a logical reaction against judicial arbitrariness and understandably seeking to achieve maximum legal security, adopted a somewhat extreme position. While doing away with the unlimited discretion of the judge, the French substituted for this principle the absolute inflexibility of the law. This approach, adopted by the French criminal code in 1791, was rapidly corrected.

The codes of the nineteenth century preferred to give some discretion to the judge, but limited it in some way. The criterion that has remained valid to this day comes from the Criminal Code of 1848:¹⁶² the abstract legal penalty generally is limited between a minimum and a maximum. Within this range, the modifying circumstances prompt a reduction so that the judges assign a more or less serious punishment than the average. Only in certain situations can these bounds be exceeded, although always within a limit established by the law. Thus, in the Spanish system – but not in the European¹⁶³ – the judge

¹⁵⁹ Ferdinand Rau, *Beiträge zum Kriminalrecht der Freien Reichsstadt Frankfurt a. Main im Mittelalter bis 1532* (1916), pp. 2-6.

¹⁶⁰ Schaffstein, note 84 above, pp. 65 ss.; G. Dahm, *Das Strafrecht Italiens im ausgehenden Mittelalter. Untersuchungen über die Beziehung zwischen Theorie und Praxis im Strafrecht des Spätmittelalters, namentlich im XVI Jahrhundert. Beiträge zur Geschichte der deutschen Strafrecht* (1931), pp. 293 ff.

¹⁶¹ Tomás y Valiente, note 31 above, pp. 331 ff.

¹⁶² In the Criminal Code of 1822 the categories of mitigating and aggravating were contained in Articles 106 and 107; the rules for the application of a punishment after the circumstances were in Article 101 ff. The courts could “never increase or decrease the punishments prescribed by the law but only in the instances and terms expressed in Article 102”. Nor “vary, commute, dispense or change in any way the punishments established by the law, or not applying them in the respective cases” (Article 108). Analogy was permitted (Article 109).

¹⁶³ Other European codes remained at the stage in which the modifying circumstances, except for those legally restricted, were left to the discretion of the judge, that is, the circumstances were not taken into consideration until the moment of assigning punishment. Concerning Finland, see Heikki Pihlajamäki, “On the Verge of Modern Law? Mitigation of Sentence in Nineteenth-Century Finland”, *Ius Commune. Zeitschrift für Europäische Rechtsgeschichte*, XXVII (2001), pp. 269-294.

is not free to consider or not the accidental circumstances that may influence the abstract framework of the punishment.

Therefore, to the abolition of judicial discretion to assign punishment it not only contributed the constitutionalization of the principle of legality, but also the definitive placement of modifying circumstances of responsibility in the General Part. The margin of judicial discretion was limited in relation to the abstract legal penalty as established by the law. Nevertheless, criminal law doctrine has not always been satisfied by the difficult balance between fidelity to legalism, typical of legal systems of the Roman tradition and judicial discretion. Since the twentieth century “there are more opinions that claim a widening of judicial discretion”.¹⁶⁴ It is obvious that judicial discretion has experienced greater pressure in the continental legal tradition than in the Anglo-Saxon. Neither experienced the rupture that Roman systems experienced at the end of the eighteenth century.¹⁶⁵

We turn more specifically to the evolution of other modifying circumstances of responsibility at the codification stage.

The state of necessity and obedience were meticulously analyzed by *ius commune* doctrine.¹⁶⁶ Obedience underwent in the early nineteenth century some reform under the influence of the liberal doctrine. With the aim of achieving the strong and unitary rule of the State, an unconditional duty of obedience by the civil servants arose, only fictitiously alleviated by the right to *demonstratio*. The extent of such obedience, which appeared in the historical context of the codification process, did not coincide with the opinions of Italian jurisprudence of the sixteenth century because there was a reluctance to admit unconditional obedience, not only to the orders of the superior, but to those of the prince. This has been the traditional approach of Spanish and Italian legal doctrine, so it is not unusual that this ultimately was the criterion chosen by the Spanish criminal codes. On the other hand, the regrettable consequences of unconditional obedience demanded and received in totalitarian European States of the twentieth century led to the definitive rejection of that principle.

Pacheco did not doubt this fact when he stated that “our old laws solved it in the same sense that the code does; and to be honest, it is unconceivable that any legislation could solve it in any other way”.¹⁶⁷ The main commentator on the 1870 Criminal Code expressed this in the same words.¹⁶⁸

Age had also been studied by *ius commune* doctrine before the codification movement.¹⁶⁹ At this point the normative sources of the Old Regime penal tradition had established

¹⁶⁴ Agustín Fernández Albor, “Aportación al estudio comparado de los sistemas penales europeos”, *ADPCP*, XIX (1966), f. I, p. 49.

¹⁶⁵ *Ibid.*, p. 54.

¹⁶⁶ Jiménez de Asúa, note 94 above, p. 66; Kuttner, note 88 above, pp. 257-298; Landau, note 95 above, p. 36; Gacto Fernández, note 95 above, pp. 34-35.

¹⁶⁷ Pacheco, note 2 above, p. 195; see also De Vizmanos and Álvarez Martínez, note 145 above, pp. 97-99.

¹⁶⁸ Groizard y Gómez de la Serna, note 145 above, I, pp. 285-286; according to this author, Article 8.12 CP 1870 agrees with D. 9, 2, 37; D. 44, 7, 20; D. 50, 17, 157 and 167; Partidas VII, 15, 5; Partidas VII, 34, rule 20.

¹⁶⁹ See D. 48, 8, 12 (Modestino); Tomás y Valiente, note 31 above, pp. 339-343; Salvador Minguijón, *Historia del Derecho español. Derecho penal* (1926), pp. 66-69; Enrique Pessina, *Elementos de derecho penal* (3d ed, 1919), p. 352; Luis Jiménez de Asúa, *Tratado de Derecho penal. Tomo I. Concepto del Derecho penal y de la criminología, historia y legislación penal comparada* (1950), p. 849; Kuttner, note 88 above, 125 f.; see Jose Martínez Gijón, “La menor edad en el derecho penal castellanoleonés anterior a la Codificación”, *AHDE*, XLIV (1974), pp. 465483; also in *L'enfant. Recueils de la société Jean Bodin pour l'Histoire comparative des institutions*, XXXVIII (1977), pp. 71-92.

attenuated irresponsibility or responsibility for minority. The normative texts under Roman influence, such as the *Partidas* or the *Costumbres de Tortosa*, admitted minority as a reason for exemption from or attenuation of responsibility,¹⁷⁰ although on other occasions teenagers were treated with some cruelty.¹⁷¹

The 1822 Criminal Code established that children under the age of seven could not be held responsible, and those between 7 and 12 were to have their abilities to distinguish tested. In effect, the first Spanish code declared children under the age of seven exempt in all cases, a limit that came from Roman law. For those over this age and under 17 an examination had to be made to see whether they acted “with the ability to distinguish and malice depending on the results, and to what extent their mental abilities are developed” (Article 24). If they had acted without distinguishing, then they were handed over to their relatives “to correct and care for them”, but if “they could not do this, or were not reliable, and the age of the minor and the seriousness of the case called for another measure, the judge could send them to a correctional institution for the period of time he considered appropriate, as long as it does not exceed their twentieth birthday” (Article 24). If they had acted with “knowledge and malice” a lesser punishment would be assigned (Article 25).

In the Criminal Code of 1848 children less than 9 years old were excluded from responsibility (Article 8.2). It was the same for those between 9 and 15, unless they had acted with knowledge (Article 8.3); in that case they were given “a discretionary punishment, but always lower in two degrees at least to that established by the law for the crime committed” (Article 72 pr.).

The reform of 1850 did not change this regulation. It was retained in 1870 (Articles 8.2-3 and 86), but revived the system of 1822 because it was established that when the minor was declared to lack responsibility, he had to be handed over to his family “to look after him and educate him” and that, “if there was nobody to take care of his vigilance and education”, he would be taken to a “charitable institution for the education of orphans and helpless”, where he would stay “until the established time and conditions for refugees” (Article 8.3).

The 1848 and 1870 codes divided minority into three periods: up to 9 years of age non-responsibility was assumed; from 9 to 15, it was necessary to verify through an examination the ability of the minor to distinguish, and if he lacked this ability, the minor was declared to be not subject to prosecution, whereas if he had this ability, he was declared to be responsible, the age then being considered as an attenuating circumstance; finally, for those between 15 and 18 years old, minority was an attenuating circumstance. The parallels and analogies regarding age between these two codes and early Spanish legislation did not remain unnoticed by some commentators.¹⁷²

¹⁷⁰ These legal instruments established two age limits, one for crimes of passion and another for the rest. In the case of crimes of passion the age of non-responsibility is 14 years for men and 12 for women (Partidas VII, 9, 11; Partidas VII, 31, 8), an age that determined a great attenuation in the punishment. In the *Costumbres* of Tortosa minority was established as below ten years and a half for imputability (Lib. II, Cost. VI, *De restitutio dels menors*; Lib. IX, Cost. XV, *Quals persons poden acusar*), and from this age to 14 years the development of intelligence was studied (*Quals persons, etc.*, Lib. IX, Cost, *De injurias*); see Gacto Fernández, note 95 above, pp. 25-26.

¹⁷¹ NoR 12, 16, 2 and the famous *Pragmatica* of Felipe V that punished robberies committed in the Court. Nevertheless, during the reign of Carlos III they began to take protective and preventive measures regarding minors in moral peril (NoR 12, 7, 11; NoR 12, 31, 8; NoR 12, 31, 10 and NoR 12, 31, 12).

¹⁷² Pacheco, note 2 above, pp. 162-169; according to this author, Article 8.2-4 CP 1848 agrees with D. 47, 10, 3; Partidas VI, 19, 4; Partidas VII, 1, 9; Partidas VII, 31, 7; NoR 12, 14, 3; De Vizmanos and Alvarez Martínez, note

Madness or dementia, today called “psychic anomaly or malfunction”¹⁷³ or “transitory mental disorder”, had also been developed by doctrine of the *ius commune*¹⁷⁴ before the codification. In the normative field the *Partidas* had incorporated the inculpability of the «*que non sabe lo que face*» (he who does not know what he is doing) and distinguished three classes of insane (*locos, furiosos* and *desmemoriados*),¹⁷⁵ categories that originated in Roman law and corresponded to the Roman *demens, furiosus* and *mantecaptus*.¹⁷⁶

The 1822 code declared that those who committed a crime in a state of madness, delirium or deprived of reason were not guilty. The 1870 code, following that of 1848, established the inculpability of the idiot and the fool when they had not committed a crime during a lapse of reason.¹⁷⁷ The code of 1928 used a more scientific formula than the previous codes, but did not satisfy psychiatrists.

We are unaware of any study about **remorse** in Spanish criminal law before the codification process. We cannot know, therefore, the role that this institution could have in the Spanish tradition. However it is surprising to see this attenuating circumstance disappear in the codification of the nineteenth century (after the 1848 code), and its revival in the twentieth century, a matter merely sketched as an introduction in a study of this circumstance.¹⁷⁸ If the 1822 penal code recorded it, this is a clear symptom of the fact that it was part of the penal tradition of the Old Regime.

A particular instance of remorse as an attenuating circumstance incorporated in the criminal code of 1822 is found in Article 292: “individuals who having committed rebellion or sedition, and according to the Articles 274 and 280 unconditionally submitted to the first summons of public authority, would not suffer for the insurrection, if they belonged to the second or third class, but would only be under special vigilance of the authorities for two years. But those convicted of first class, in cases of rebellion, would suffer imprisonment from six months to three years, with deprivation of public jobs or charges that had obtained, and would be subject to vigilance by the authorities, with equal deprivation of public jobs or charges”.

This precept, first incorporated in the *Novísima Recopilación*,¹⁷⁹ was later modified by the Code of 1848-50 (Article 182) and remains in force.¹⁸⁰ Recorded in the 1822 code as

145 above, pp. 69-71; Groizard and Gómez de la Serna, note 145 above, p. 203; according to this author, Article 8.2-3 CP 1870 agrees with D. 47, 10, 3; Partidas VI, 19, 4; Partidas VII, 1, 9; Partidas VII, 31, 8; NoR 12, 14, 3.

¹⁷³ See for instance in Article 20.1 Spanish CP, Article 96, Italian CP; Article 41, Argentinian CP; and Article 20 German CP.

¹⁷⁴ In classic and post-classic Roman law it had been definitively shaped the doctrine that minors who are mentally disabled are not subject to prosecution (*furiosi*): “unde Pomponius ait neque impuberem neque furiosum capitale fraudem videri admisisse” (Modestino, D. 48, 8, 12) (Blanch Nagues, note 118 above; Tomás y Valiente, note 31 above, pp. 336-337; Minguijón, note 168 above, pp. 71-72; Kuttner, note 88 above, pp. 85-110.

¹⁷⁵ Partidas VII, 1, 9.2; Partidas VII, 8, 3; Partidas I, 1, 21; Groizard and Gómez de la Serna, note 168 above, I, p. 168; see Gacto Fernández, note 95 above, pp. 26-27.

¹⁷⁶ D. 13, 1, 9; D. 42, 1, 9; *De regulis iuris*, 40: «Furiosi...nulla voluntas est».

¹⁷⁷ Also when studying this circumstance some commentators have pointed out its important precedents in our old legislation, that is: Pacheco, note 2 above, p. 155; De Vizmanos and Álvarez Martínez, note 145 above, pp. 55 ff.; Groizard and Gómez de la Serna, note 168 above, I, pp. 168 and 171.

¹⁷⁸ Ángel De Sola Dueñas, “Lo subjetivo y lo objetivo en la circunstancia atenuante de arrepentimiento”, *ADPCP*, XXIV (1971), II, pp. 417-423.

¹⁷⁹ NoR 12, 11, 5.

¹⁸⁰ Article 182: “When the rebels or seditious split up or submitted to the legitimate authority before the intimations or as a consequence of them, there would be exempted from all punishment the mere executors of any of those crimes, and also the seditious included in Article 175, unless they were civil servants. In this case

mitigating the punishment, in the 1848 code it was formulated as a total exemption. A similar term was used in the code of 1870 (Article 258),¹⁸¹ and thus it has endured until now.¹⁸²

Sex,¹⁸³ **intoxication**,¹⁸⁴ **recidivism**,¹⁸⁵ and **treachery**,¹⁸⁶ all modifying circumstances of responsibility that were incorporated by the codification movement, existed in the penal tradition of the Old Regime. The most important reforms introduced in the criminal codes were, on the one hand, the location of all the mitigating circumstances in the General Part, and within this Part the introduction of various categories of complex and modern theories of crime such as typical, illegal, guilty and punishable, and on the other hand (though in the twentieth century), all these circumstances revolved around guilt, the central and core element of the concept of crime under the doctrine of the *ius commune*.

Humanization

We have pointed out that humanization of the penal law was not an innovative contribution of the Enlightenment thought because some jurists of the *ius commune* had established the importance of humanizing punishments and creating an appropriate proportion between crime and punishment.¹⁸⁷

It was also said that both the gradual process of depenalization of some criminal cases and the reduction of the number of punishments could be attributed to the humanization of the liberal criminal law, although this effort also followed the trend towards secularization.

In our view commencing with Tarello, Enlightenment thought began to prefer the use of the custodial and financial punishments,¹⁸⁸ eliminating slowly, but progressively, corporal and humiliating punishments.

Do not imagine, however, that the typology of punishments in the criminal codes was a genuine contribution of the codification process. Both financial and custodial punishments, as well as limitations of rights, were part of the system of punishments of the Old Regime. In the nineteenth and twentieth centuries the slow process of punishment humanization occurred. This led to the abolition, mitigation, or increased severity of some punishments up to the present system.¹⁸⁹

Neither should we suppose that the liberal ideology always managed to reduce punishments. Although the need to soften punishments was obvious, its effective realization was more complex. Bentham's utilitarianism and the idea of prevention or

the Courts would decrease for the rest of them by one or two degrees the punishments established in the two previous sections"; Pacheco, note 2 above, pp. 680-682.

¹⁸¹ Groizard and Gómez de la Serna, note 145 above, III, pp. 428-435.

¹⁸² About this question, see the research of Manuel Cobo, "Función y naturaleza del artículo 226 del Código penal", *ADPCP*, XXI (1968), I, pp. 53 ff.

¹⁸³ Minguijón, note 168 above, p. 65 and 69-71; Jiménez de Asúa, note 168 above, I, p. 849.

¹⁸⁴ Pessina, *Elementos de derecho penal*, p. 417-418; Minguijón, note 168 above, p. 72; Kuttner, note 88 above, pp. 110-124; it also appears as state of intoxication in the majority of penal codes in force, i.e. Article 21.2 Spanish CP, Articles 91-94 Italian CP, Article 41 Argentinian CP, and Articles 20-21 German CP.

¹⁸⁵ Tomás y Valiente, note 31 above, pp. 343-346; the postclassic and Justinian Roman law already had rules that punished recidivism (*C. Th.* 6, 1, 4, 1; *C.* 6, 1, 4.1). Blanch Nogues, note 118 above.

¹⁸⁶ Tomás y Valiente, note 31 above, pp. 346-350.

¹⁸⁷ See note 19 above and its corresponding main text.

¹⁸⁸ See note 21 above, and corresponding main text.

¹⁸⁹ Masferrer, note 6 above, pp. 177-187.

intimidation occasionally intensified the infamous effect of some punishments and the executory process. It has been rightly said that “there were not only ruptures regarding punishments. There also were elements of continuity with the Old Regime in the initial stage of liberalism in some Courts”,¹⁹⁰ and the idea of exemplarity, which demanded that punishments be publicized. This constituted a sad epilogue to the previous tradition within a liberal political context and was encouraged by modern Enlightenment thought.

PROGRESSIVE ABOLITION OF HUMILIATING OR DEGRADING PENALTIES

However, the progressive abolition of humiliating or degrading penalties can be seen. This process, not completed in the nineteenth century, enduring throughout the twentieth century, when some punishments were abolished, such as the death penalty, bail and judicial admonition, to give examples of infamous penalties.¹⁹¹

We have witnessed the triumph of liberal political reforms and its consequences in penal matters; specifically, the definitive abolition of some punishments and other practices from the Old Regime. We are referring to the use of torture as evidentiary means, to the transcendent character of some punishments, the confiscation of goods, and humiliating punishments such as the lash. The abolition of these punishments and practices were the early victories achieved by Enlightenment thought due to liberal political reforms authoritatively made before the codification process.

Other punishments were gradually abolished throughout the nineteenth century during the codification process. A good example of humanization was the abolition of infamy and other humiliating penalties, such as degradation, *argolla* and public disgrace. We trace briefly the abolition of these punishments.

The punishment of infamy consisted in the formal and legal removal of the criminal's honor, so that he was unable to exercise all those rights that demanded a good name (that is, inability to accuse and give testimony, postulate and contest any public charge, among others). This notorious punishment, in force in the Peninsula and in Europe from the Roman period until the nineteenth century,¹⁹² was recorded in the first Spanish penal code. After being extensively regulated in the code of 1822, it was explicitly abolished in the following legal text, in 1848, in Article 23 (“Law does not recognize any penalty of infamy”).¹⁹³ Although this may be surprising, it is no exaggeration to state that no period in the Spanish penal tradition had determined so many crimes punishable with infamy; some new, some from the Old Regime.

Certainly, the abundant presence of such punishments in the 1822 code contrasts with the similar Article 23 of the 1848 code: “Law does not recognize any punishment of infamy”. As is reflected in Act No. 12 adopted at the session of 29 October 1844, the members of the Commission were on this occasion clearly convinced that it should be abolished.¹⁹⁴

¹⁹⁰ Babiano y Mora and Fernández Asperilla, note 42 above, p. 396.

¹⁹¹ Masferrer, note 6 above, pp. 172-177.

¹⁹² Masferrer, note 42 above.

¹⁹³ See Pacheco, note 2 above, pp. 309-313.

¹⁹⁴ Juan Fco. Lasso Gaité, *Crónica de la Codificación española. Codificación penal* (1970), II, p. 555; this does not mean that the drafts prior to the Code of 1848-50 did not incorporate it, as all of them, except for that of 1830,

Although the punishment of infamy was abolished in the Code of 1848, the complete disappearance of the infamy or other humiliating punishments did not occur instantaneously. The abolition of infamy did not prevent similar punishments from being assigned, such as public reprehension, the *argolla*, and demotion.

The abolition of infamy as a punishment, so rooted in the thought of the great authors of codification, decisively influenced the survival of some punishments which, although not formally and legally considered to be infamy, emphasized the infamous effect that the commission of the crime had by itself.

According to the Article 51 of the 1848 Penal Code, “*argolla* and civil demotion mean the perpetual and absolute debilitation and permanent vigilance by the authorities during the lifetime of the criminals”. Whereas the perpetual and absolute disqualification was autonomously established in Article 30 of this code, the intention of the legislator with respect to infamy is clear given the effects of the *argolla* and demotion.

These humiliating penalties were slowly abolished in Spanish penal law: civil death was not regulated in the code of 1848; demotion, in 1928; and the *argolla*, in the code of 1870.¹⁹⁵

The gradual abolition of infamy punishments shows that humanization expressed modern ideas but was not readily accepted as part of codification. With regard to punishments, there was not a sharp break. It has been noted that during the initial phase of liberalism in the *Cortes* of Cádiz elements of continuity persisted in relation to the Old Regime.¹⁹⁶ The concepts of usefulness and exemplarity, embedded in the nineteenth century mentality, explain the continued presence of the infamy in Spanish codification. A regrettable survival of the previous tradition, it endured in the political context of an absolute monarchy and was favored by modern Enlightenment thought.

NINETEENTH CENTURY REFORMS OF CURRENT PUNISHMENT SYSTEM

Notwithstanding the autonomy of the financial, limitations of freedom, and restrictions of rights punishments in the law preceding codification, it is undeniable that they acquired prominence in the nineteenth century, eventually becoming three major types of punishments in modern Spanish law.¹⁹⁷ What evolution did codification experience in the nineteenth century? We briefly examine this.

Financial punishments, that is, to pay a sum of money to the State as a punishment, or the confiscation of all or part of a criminal’s wealth, is a punishment of the multiseular tradition. The origin of this punishment dates back to the earliest legislation, being present in Roman law, German, and canon law. Over the course of many centuries this had become a main punishment,¹⁹⁸ although due to economic circumstances in the nineteenth century

incorporated them.

¹⁹⁵ On the abolition of these punishments, see note 209 below and the corresponding texts.

¹⁹⁶ See the quotation in note 61 above and corresponding main text.

¹⁹⁷ Masferrer, note 6 above, pp. 177-187.

¹⁹⁸ Historical Catalan law punished various criminal behavior (3rd CYADC I, 4, 26, 13; 3rd CYADC I, 7, 11, 16; 3rd CYADC I, 8, 1, 9; etc.); see Alonso Romero, “Aproximación al estudio de las penas pecuniarias en Castilla (siglos XIII-XVIII)”, pp. 9-94, note 51 above; Joaquín Cerdá RuízFunes, “Dos ordenamientos sobre las penas pecuniarias para la Cámara del Rey (Alfonso XI y Enrique III)”, *AHDE*, XVIII (1947), pp. 442474; Tomás

it began to lose importance and in the twentieth century had a relatively small role, despite the fact that fines were more welcome in recent times.

When we speak of financial punishment, we mostly refer to fines, not to confiscation of goods, a punishment once abolished but reinstated in some countries. However, the codes included as a financial punishment, besides fines, the confiscation of objects or tools used for the crime,¹⁹⁹ an institution which originated in the penal tradition preceding codification.²⁰⁰ Thus, Spanish codes codifying the tradition of earlier laws incorporated two types of financial punishments: fines and confiscation of objects or tools used to commit the crime.

Another punishment directly related to financial penalties is imprisonment for debts. This punishment, considered by Tomás y Valiente only from the civil point of view,²⁰¹ originated in the failure to fulfill obligations *ex delicto*, that is, as a consequence of the nonpayment of a debt established by a sentence in a criminal proceeding.

Although it is true that the **punishments which restricted freedom** have become widespread since the liberal period, we do not share the rather simplistic view of Landrove, who believed that “these punishments are going to reach their primary role: the death penalty and corporal penalties”.²⁰²

It is true that from the nineteenth century the codified punishment system of the criminal law contained punishments which restricted freedom, but one must not forget that these did not appear in that century and that the death penalty and corporal punishments never encapsulated on their own the punishment system of the Old Regime penal tradition.²⁰³ A study of the Spanish penal tradition demonstrates that, despite the excessive use of those penalties in some historical periods — especially in absolutist political systems — they always coexisted with other kinds of punishments such the financial or restrictions on rights punishments.

Under codification, imprisonment began to play a more important role than in the penal tradition of the Old Regime; however, we must recall that this arose and developed extraordinarily in the Modern Age. Jails and prisons were well-known penitentiary

y Valiente, note 31 above, pp. 393-394; J. L. de las Heras, *La Justicia penal de los Austrias en la Corona de Castilla* (1991), pp. 290-298.

¹⁹⁹ Articles 28, 89 and 91 CP 1822; Articles 24, 59 y 490/502 CP 1848/50 (see Pacheco, note 2 above, pp. 370-371); Articles 26, 63 and 622 CP 1870 (see Groizard and Gómez de la Serna, note 145 above, II, pp. 305-309); Articles 90, 91 and 134-136 CP 1928 (see A. Jaramillo García, *Novísimo Código penal comentado y cotejado con el de 1870* (1928), I, lib. 1, pp. 263-264); Articles 27, 48 and 597 CP 1932; Articles 27, 48 and 602 CP 1944.

²⁰⁰ When studying the penal normative (local and general) of the Catalan Principality, we note the frequent regulation of this punishment in the Low Medieval and Modern Periods (Masferrer, “L’element sancionador i el contingut penal de les ordinations municipals catalanes. Especial consideració a les Ordinations de Girona de 1358”, *Actas del XVII Congreso de Historia de la Corona de Aragón (Barcelona-Lleida, 7-12 de septiembre)* (in press); id, “La influència dels Usatges en l’ordenament juridicopenal dels municipis de la Catalunya Nova. Notes per a un estudi”, *El territori i les seves institucions històriques. Actes Ascó, 28, 29 i 30 de novembre de 1997* (1999), pp. 809-837.

²⁰¹ Tomás y Valiente, “La prisión por deudas en los Derechos castellano y aragonés”, *AHDE*, XXX (1960), pp. 249-289.

²⁰² Gerardo Landrove Díaz, “La abolición de la pena de muerte en España”, *ADPCP*, XXXIV (1981), f. I, p. 17; it is preferable to avoid stereotyped statements of this kind that have little to do with reality, and the more so — if that is possible — when they come from a penalist who has merely studied the penal tradition from time to time.

²⁰³ M. A. Morales Payán, *La configuración legislativa del delito de lesiones en el Derecho histórico español* (1997), pp. 223-226.

institutions in all modern centuries. The origin and application of this punishment was not a contribution of the codification process, although we must admit the important role that this process has played since that moment.

The codification movement established that imprisonment could not only be assigned as a main punishment, but also in a subsidiary way, that is, when the criminal could not pay the fine imposed by the sentence. This is the so-called “restriction of freedom punishment for not paying a fine”.²⁰⁴ Historically, this institution, called among other names “imprisonment for debt”, was regulated in many peninsular normative sources, territorial, general, and local. In fact, as one can deduce from its frequent use and regulation by the sources, it became an enormously useful measure to address problems of insolvent criminals being assigned financial punishments.

It is not surprising, therefore, that this institution was included in the first penal code. Nevertheless, “although during the first period of penal Codification the existence of this institution was not criticized, since the twentieth century the imposition of a serious punishment on those who, by the fact of having no economic resources, cannot satisfy a financial penalty has been questioned”.²⁰⁵

It does not seem necessary to analyze the evolution of this institution in the codification process. Prior to 1870 it was called “subsidiary deprivation of freedom”, and after 1822 this punishment could be applied “in all cases of fine charging” (Article 91). The 1870 Code, aiming to introduce new alternatives for the instances of criminals’ insolvency, modified the name without changing the content or the sense of the institution, calling it “subsidiary personal responsibility”.²⁰⁶

Later, although the alternative measures that originated the change in terminology had formally disappeared, the name remained the same. It was after the *Exposicion de Motivos* in 1932, and especially in 1944, when the legislature, doctrine, and jurisprudence questioned the nature of this institution, that is, whether it should be considered a punishment involving deprivation of freedom or subsidiary personal responsibility.²⁰⁷

Another interesting aspect in the evolution of this institution is the methods used to convert a fine into imprisonment. These are two: the fixed method, which remained in force until the code of 1928; and free judicial will, introduced in the 1932 code and still in force. The evolution experienced by this institution throughout the codification period reflected that which took place in the old penal tradition, when both were used, depending on the moment and the normative text.

The notion “punishments restricting freedom” was coined in the codification stage, but its content and sundry forms have a great multiseular tradition in historical Spanish law and in the European and American legal-penal tradition as a whole.

²⁰⁴ A. Jareño Leal, *La pena privativa de libertad por impago de multa* (1994).

²⁰⁵ Jareño Leal, note 204 above, p. 25.

²⁰⁶ Article 94 CP 1822; Articles 50-52 CP 1848; Article 49 CP 1850 (see Pacheco, note 2 above, pp. 355-358); Article 51 CP 1870 (see Groizard and Gómez de la Serna, note 145 above, II, pp. 274).

²⁰⁷ Jareño Leal, note 204 above, p. 40.

The present punishments restricting rights are rooted in the earlier humiliating punishments (or infamy in a wide sense),²⁰⁸ and particularly in the infamy penalty *stricto sensu*.²⁰⁹

Spanish law historically incorporated various punishments that engaged the loss of rights; some disappeared during the codification because of their association with infamy. This was the case of civil death – incorporated in Partidas IV, 18, 2 and kept in the 1822 code (Article 53); degradation – frequently applied in canon law and incorporated in the 1848-50 and 1870 codes;²¹⁰ and interdiction – of Roman origin and multiseular tradition, regulated by Spanish penal law until recently.²¹¹

One should take into account that in the Spanish and European penal tradition, these loss of right punishments often aimed to remove the criminal's honor, a goal that was not only achieved by the application of these penalties or of the infamy punishment, but also due to such penalties as the *argolla* – in force until 1870;²¹² the publicity of the sentence,²¹³ admonition,²¹⁴ reprimand,²¹⁵ and redemption.²¹⁶

Among the penalties that provoked the loss of rights and have not been mentioned here are inhabilitation, suspension, and loss of the job and/or public charge, which nowadays constitute a basic segment within the Spanish punishment system, as well as the majority of the European countries. But we must remember that penalties like loss or deprivation, inhabilitation and suspension of the public charge already played an important role in the penal system of the Old Regime, as the peninsular normative sources reflect. A right depriving penalty regulated in the Spanish legal tradition which was not recorded in the codification process was the loss of salary.

This is not the right place to analyze the regulation of these penalties in the codification process, but we do observe that almost all of the problems created by these kinds of penalties are rooted in their historical regulation. An interesting study in progress on dehabilitating penalties for the exercise of a public function in the European Codification reflects and demonstrates this statement²¹⁷.

The only substantial reform of the codification process concerning these penalties that meant a real rupture with the sense and function of this type of penalty in the Spanish penal tradition was the abolition of the stigmatizing effect linked with its application. But this reform was not drastic and expeditious. On the contrary, it was the final result of a

²⁰⁸ A general perception of this punishment in the Low Middle Age and Modern European environment can be seen in Masferrer, note 156 above.

²⁰⁹ Masferrer, note 35 above; id, note 60 above.

²¹⁰ Articles 24, 29, 51, 52 and 114 CP 1848-50 (see Pacheco, note 2 above, pp. 331, 361-365 y 468-469); Articles 26, 54 and 120 CP 1870 (see Groizard and Gómez de la Serna, note 145 above, II, pp. 285-294).

²¹¹ Articles 24, 41 and 55 CP 1848-50 (see Pacheco, note 2 above, pp. 343-345 and 366-368); Articles 26, 43 and 54 CP 1870 (see Groizard and Gómez de la Serna, note 145 above, II, pp. 233-246 and 285-294); Articles 786 CP 1928; Articles 27, 42 and 44 CP 1932; Articles 27, 43, 45 and 72 CP 1944.

²¹² Articles 24, 29, 51, 52 and 113 CP 1848-50; or also the duty to observe another's execution: (Articles 62, 63 and 100 CP 1822).

²¹³ Article 87 CP 1822.

²¹⁴ Articles 84 and 86 CP 1822.

²¹⁵ Articles 85 and 86 CP 1822; Articles 24 and 110 CP 1848; Articles 24, 79 and 110 CP 1850; Articles 26, 92 and 117 CP 1870; Articles 27, 77 and 92 CP 1932; Articles 27, 73 and 89 CP 1944.

²¹⁶ Articles 81 and 83, CP 1822.

²¹⁷ On the history of these penalties, we only have the study of Antonio Beristain, "La inhabilitación penal ayer, hoy y mañana", *Revista General de Legislación y Jurisprudencia*, LIII (1966), pp. 249-292.

slow and gradual process, which according to some authors must not be considered to be finished until such measures lose their character as punishment, as in European models such as the German. A first step towards the application of this punishment without the stigmatizing or infamy element was the abolition of infamy (Article 23, CP 1848), which for many centuries had affected those who had been suspended or deprived from their public charge or job. But this reform was insufficient so long as the perpetual character of this punishment was not abolished, which took place in the code of 1870.

Certain controversial aspects of this class of punishment, for example, its duration, or its principal or secondary character, its penal or safety nature, its rehabilitation, and others, are factors whose complexity originates in the penal tradition predating the codification.

Secularization

As already noted, secularization of criminal law, another major objective of the new science of criminal law, was a product of the secularization of society and law.²¹⁸ The distinction between the moral and legal order, the concepts of crime and sin, necessarily brought a gradual but progressive decriminalization of some behavior whose punishment had a multisecular tradition.

DISTINCTION BETWEEN LAW AND MORALS

With regard to the ideological principles of the scientific method, the theological base of monarchical absolutism had little to do with the political dealing defended by Hobbes; the division between law and morals proposed by Kant had immediate effects in the legal-penal sphere: penal theologism, typical of the Old Regime, was replaced by secular criminal law as a result of the general secularization of law to which the German jurist, Christian Thomasius, decisively contributed.²¹⁹

We will not consider here the close relationship between crime and sin,²²⁰ nor the moralizing function of criminal law before codification;²²¹ these are well-known aspects, although not always correctly analyzed and explained. We must say, however, that the codification movement only incorporated gradually the new ideological orientation of penal science.

Because of the secularization of law, and specifically criminal law, the binomy crime-sin progressively disappeared in certain fields of human behavior penally regulated, as

²¹⁸ See note 18, and corresponding main text.

²¹⁹ H. Rüping, "Carpozov und Thomasius", *ZStW*, CIX (1997), Heft 2, pp. 381-389.

²²⁰ Bartolomé Clavero, "Delito y pecado. Noción y escala de transgresiones", *Sexo barroco y otras transgresiones premodernas* (1990), pp. 57-90; Kenneth Pennington, "Pro peccatis patrum puniri: a Moral and Legal Problem of the Inquisition", *Church History*, XLVII (1978), pp. 137-154; Isabel Pérez Muñoz, *Pecar, delinquir y castigar: el tribunal eclesiástico de Coria en los siglos XVI y XVII* (1992); Tomás y Valiente, note 31 above, pp. 219 ff.; id, "Delincuentes y pecadores", *Sexo barroco y otras transgresiones premodernas* (1990), pp. 11-32; id, "El crimen y pecado contra natura", *Sexo barroco y otras transgresiones premodernas* (1990), pp. 33-55.

²²¹ About these question, see Masferrer, note 156 above; id, "La función moralizante del Derecho penal en las *Costums de Miravet* y de otros municipios catalanes en el contexto jurídico europeo bajomedieval y moderno", a communication presented in the *Jornades d'Estudi sobre els Costums de la Batllia de Miravet. 680è Aniversari Gandesa, 1319 / Arles, 1320* (Gandesa, 16-18 June 2000).

well as such notions as merely penal and mixed penal laws typical of the philosophical and penal doctrine of the Old Regime.

GRADUAL DECRIMINALIZATION OF CERTAIN CRIMINAL BEHAVIOR

The principal reason for the rupture that took place in the pre-codification period was the aforementioned secularization of law in general, and criminal law in particular. This happened, without doubt, as a result of the criminal law structures fashioned during the codification process. This secularization particularly affected the decriminalization of some behavior that, bound to an existing moral and theological order and closely linked with the old criminal law system, was punished over the centuries in the European penal tradition, and as a consequence, also in the Spanish tradition. In this sense we may speak of a rupture, but should take into account that this happened because of the triumph of the liberal revolution. A new political system was established that, in keeping with Enlightenment ideas, replaced the theocentric with the anthropocentric.

Even though the Spanish criminal codes gradually adopted the consequences of the Enlightenment penal system, they were not really, regarding criminal behavior, a break in a strict sense, but more of a reform, because “gradual rupture” and “reform” mean the same thing.

The real rupture took place before the codification process. This performed the duty of applying the new system progressively so that, in respect of criminal behavior, it was not slow enough to be considered a reform or a rupture. The lengthy decriminalization of certain crimes against religion, blasphemy, adultery, *amancebamiento*, incest, or illegal games, all regulated until the second half of the twentieth century, is proof of what we have said.²²²

We can deduce that, regarding behavior penalized by Spanish codes, reform and continuity are expressions that better qualify the transition and evolution of criminal law from the Old Regime to the codification process. There are some crimes which, although regulated in the Spanish penal tradition, were recorded first in Spanish codes, later reformed, and then decriminalized.²²³

The punishment of **illegal games**, regulated throughout the Spanish penal tradition,²²⁴ was recorded in the various Spanish codes,²²⁵ with the exception of the 1822 code. There were many attempts to decriminalize this conduct before the codification; they did not succeed, despite the fact that, according to some authors, the historical legislation on this matter shows it was rarely effective. Perhaps for this reason such games were tacitly tolerated, which did not contribute to the disappearance of the individual and social

²²² See the recent study of Fernando de Santamaria Lambas, *El proceso de secularización en la protección penal de la libertad religiosa* (2002), which points to the gradual secularisation of Spanish penal law during the codification.

²²³ For a broader perspective, see Masferrer, note 6 above, pp. 188-215.

²²⁴ On the historical and legal precedents of this crime, see Alfonso Serrano Gómez, “Juegos ilícitos”, *ADPCP*, XXX (1979), f. II, pp. 307-309, where Compilations and other Castilian texts are collected; see also the research of Roman Pina Homs, “Sobre la penalización del juego en el Reino de Mallorca”, *Cuadernos de la Facultad de Derecho* (1982), II, pp. 81-105.

²²⁵ Articles 260 and 261 CP 1848-50 (see Pacheco, note 2 above, pp. 824-827); Articles 358-360 CP 1870 (see Groizard and Gómez de la Serna, note 145 above, IV, pp. 70-89); Articles 743-749 CP 1928; Articles 353-355 CP 1932; Articles 349 and 350 CP 1944.

problems that these games created. It has been rightly said that “the problems have been almost the same throughout history, whether gambling is forbidden or not”.²²⁶ Thus, the codification process leading towards gradual decriminalization was not achieved until recent times.

Crimes against honesty are another example of reform intended to achieve gradual decriminalization of some forms. Thus, for instance, adultery and unmarried relationships, of multiseular tradition in European legal culture, were not decriminalized until 1978.²²⁷ These crimes were recorded in all the codes,²²⁸ except that of 1932. We can say the same of other behavior, such as rape of a minor-incest, bigamy, having a concubine, homosexuality and prostitution, crimes of secular tradition that, incorporated in almost all Spanish penal codes, were decriminalized in the second half of the last century. We cannot say the same of rape, a type of crime that logically remains valid in the Spanish system.

It is reasonable that secularization may have affected certain **behavior related to public and social morality**, and that, while regulated in the early Spanish codes, the crimes were finally abolished or modified. This was true for blasphemy²²⁹ and the proclamation of doctrines contrary to public morality, behavior closely linked with the crime of public scandal.²³⁰

The proclamation of doctrines contrary to public morals, included for the first time in the 1870 code, lacked clear and specific incrimination because it was not easy to understand the reason for this provision, “if it was not for the insufficiency of the punishment for genuine public scandal absent in the 1848 code (Article 482) or the criminal figure of the 1850 reform (Article 364)”.²³¹

As Martínez-Pereda informs us, the 1870 code incorporated this in a precept without precedent in the Spanish tradition or any other within the European environment, that “will incur in a fine of from 125 to 1.250 pesetas those who exhibit doctrines or state them in the press and with scandal that are contrary to public morals”,²³² a formula followed by the 1932 code (Article 436) with minor differences.²³³

²²⁶ Serrano Gómez, note 224 above, p. 310.

²²⁷ On this point see J. García-Puente Llamas, “La despenalización del adulterio y del amancebamiento en España”, *Revista Española de Derecho Canónico*, XXXV (1979), pp. 371-378.

²²⁸ Articles 669, 674 and 683-685 CP 1822; Articles 349-353 CP 1848; Articles 358-362 CP 1850 (see Pacheco, note 2 above, pp. 1042-1056); Articles 448-452 CP 1870 (see Groizard and Gómez de la Serna, note 145 above, V, pp. 5-74); Articles 620-623 CP 1928; Articles 449-452 CP 1944.

²²⁹ Article 234 CP 1822; Article 480.1 CP 1848; Article 481.1 CP 1850; and Articles 567.1 and 239; it was not punished in the codes of 1870, 1928, and 1932.

²³⁰ Articles 627-634 CP 1822; Article 364 CP 1850; Articles 455-457 CP 1870; Articles 616-619 CP 1928; Articles 433-436 CP 1932; Articles 431-433 CP 1944.

²³¹ Martínez-Pereda, “Proclamación de doctrinas contrarias a la moral pública”, p. 654; bear in mind, however, that Articles 527-534 CP 1822 were not studied by Martínez-Pereda.

²³² Article 457. (see Groizard and Gómez de la Serna, note 145 above, V, pp. 146-147).

²³³ Later, the code of 1944 (Article 433) sanctioned with a fine of from 1.000 to 5.000 pesetas “those who exhibit or state by use of the press or any other procedure of publicity, or with scandal, doctrines contrary to public morals”. The fundamental novelty consisted, in his opinion. “in comparing other advertisement media to the press, as the radio and other similar media become more widespread and extend the effects at the same level or even more than press itself”. Martínez-Pereda, “Proclamación de doctrinas contrarias a la moral pública”, p. 655.

CONCLUDING CONSIDERATIONS

Since above it was observed that the principles of systematization, secularization, and humanization synthesized the main contributions of Enlightenment thought in the new legal and criminal science, it is logical to conclude that legislation on criminality and the implementation of these principles reflects the most progressive aspects of penal science in the nineteenth century.²³⁴ In effect, the principal advances of criminal science in the nineteenth century can be placed within the framework of these three concepts: systematization, humanization and secularization, although not all underwent the same evolution.

The study of the important advances of the new science of criminal law as crystallized in those codes allows us to avoid clichés about the codification movement and offers a less ideologized vision of the science of criminal law in the nineteenth century, indebted in many areas to early Roman-canon doctrines.

If the penal codes gradually accepted the consequences of the new Enlightenment penal system, they did not represent a rupture with the past in the strict sense, but a reform.

The real rupture preceded the codification process. The codes gradually and progressively introduced a new criminal system that, regarding criminal acts for instance, developed at a pace sufficiently slow to be more accurately called “reform” and not “rupture”. The lengthy decriminalization of crimes against religion, blasphemy, adultery and having a concubine, incest, or illegal gambling, all regulated in Spain until the second half of the twentieth century,²³⁵ is ample proof.

Reform and continuity are perhaps the expressions that best describe the transition and evolution from the criminal law of the Old Regime to the codification period in Spain.

Nevertheless, the scientific contribution of the codification to the development of the concepts, legal institutions and categories of the Spanish Criminal law tradition remains still quite unknown. There is still much to be done on this field. What I wrote about it some years ago needs to be deepened²³⁶, following the path of the French²³⁷ and German²³⁸ historiography.

²³⁴ See Masferrer, note 6 above.

²³⁵ See Santamaria Lambas, note 221 above.

²³⁶ Masferrer, note 6 above.

²³⁷ On the Codification of French Criminal law, see Aniceto Masferrer, “Continuismo, reformismo y ruptura en la Codificación penal francesa. Contribución al estudio de una controversia historiográfica actual de alcance europeo”, *Anuario de Historia del Derecho Español*, LXXIII (2003), pp. 403-420.

²³⁸ On the discussion about continuity and reform in the nineteenth century Germany, see Karl Härter: “Kontinuität und Reform der Strafjustiz zwischen Reichsverfassung und Rheinbund”, *Reich oder Nation? Mitteleuropa 1780-1815* (herausgegeben von Heinz Duchhardt und Andreas Kunz). *Veröffentlichungen des Instituts für Europäische Geschichte Mainz*, Abteilung Universalgeschichte, Beiheft 46, Mainz 1998, pp. 219-278; Regula Ludi: *Die Fabrikation des Verbrechens. Zur Geschichte der modernen Kriminalpolitik 1750-1850* (Frühneuzeit-Forschungen 5), Tübingen, bibliotheca academica, 1999 (a review of this research can be found in Karl Härter: “Von der «Entstehung des öffentlichen Strafrechts» zur «Fabrikation des Verbrechens». Neuere Forschungen zur Entwicklung von Kriminalität und Strafjustiz im frühneuzeitlichen Europa”, *Rechtsgeschichte. Zeitschrift des Max-Planck-Institut für europäische Rechtsgeschichte*, I (2002), pp. 159-196); see also Karl Härter: “Reichsrecht und Reichsverfassung in der Auflösungsphase des Heiligen Römischen Reichs deutscher Nation: Funktionsfähigkeit, Desintegration und Transfer”, *Zeitschrift für Neue Rechtsgeschichte*, XXVIII (2006), pp. 316-337.