

Evolution of the Spanish Criminal Law from the 1848 Penal Code to the 1995 Penal Code and its later reforms.

1. On behalf of King Carlos the Third minister of Mercy and Justice, Manuel de Roda, Lardizábal Uribe structured a Draft proposal of criminal code in 1787. This constitutes the first serious intent of a modern Spanish Penal Code. Nevertheless, it seems that the document was little more than a compilation and systematization of the already existing Ancient Regime criminal legislation. King Fernando the Seventh, despite abrogating the 1812 liberal constitution, commissioned in September 1819 the preparation of a penal code, without success: Early 1820, Riego military rising inaugurated the liberal three-year period, from 1820 to 1823, and it was then, once restored the 1812 constitution, that the 1822 first Spanish Penal Code was passed.

1822 Penal Code inspires in the traditional Spanish Criminal Law as well as in 1810 French Napoleon Code. It is a long, casuist and inclusive of procedural and administrative provisions regulation. It recognizes the legality principle for crimes and penalties, punishes few cases of negligent crimes, and follows an utilitarian, crimes preventing-based, theory of punishment. In force a few months, from January to October 1823, when absolute monarchy is reestablished, its influence on the 1848 penal code is of great importance.

2. Criminal Law of the Ancient Regime rules again from October 1823 till July 1848. Along the thirties four drafts of a new penal code circulate, but only in 1848 a new liberal-conservative penal code comes into force.

The code has strong influences from the 1810 French penal code, the 1819 Neapolitan penal code and the 1830 Brazilian penal code. It reinforces the legality principle concerning crimes and penalties and markedly restricts the judicial discretion in sentencing. The regulation of the liability and sanctions systems -general part- is much more detailed than in other contemporary penal codes. Praiseworthy is the generous shaping of self-defense, but punishment, under general clauses, of whatever negligent crime and the ample admission of strict liability are relevant shortcomings. The system of sanctions adopts a retributive as well as deterrent approach, paying scarce attention to offenders' rehabilitation. Imprisonment, frequently associated to forced labor, are keystones of a rigorous sanctions system, which includes death penalty either as

determinate or alternative sanction, and quite a number of long and very long imprisonment sanctions. The code expresses its conservative standpoint through the severe punishment of crimes against the state and its institutions, crimes against religion and crimes against morals. Its liberal side is shown through the severe punishment of crimes against property and forgeries.

In 1850 was passed an outstanding reform, which increases the conservative and severe profile of the code. Legality principle concerning penalties is abolished, inchoate offences are punished in all cases, penalties for rebellion crimes are sharply increased, and both attack on authority and contempt of authority crimes are expanded and more severely punished. Robbery penalties are diminished.

3. 1868 liberal revolution brought about 1869 constitution and the abdication and exile of Queen Isabel the Second. Those changes felt necessary a reform of the penal code, if not a new penal code. The former took hastily place in summer 1870, though using different existing draft proposals from 1869. It comes into force at the end of August 1870, and it constitutes a profound reform of the 1848 penal code, being postponed the making of a new penal code.

It is a liberal reform. Legality principle for penalties is reintroduced, judicial discretion in sentencing is further restricted in accordance with a determinate sentencing system. On liability, inchoate offences are again occasionally punished; however, strict liability remains. On sanctions, the retributive approach strengthens, there is some reduction on deterrent goals, and rehabilitation is still missing. A remarkable humanization of penalties is achieved: Death penalty is never a determinate penalty, and numerous crimes do not foresee it anymore; life imprisonment becomes ineffective, because pardon is compulsory after 30 years of deprivation of liberty; accumulation of crimes allows a penalty not higher than the triple of the most severe penalty imposed, and never over 40 years. Yet, prison penalties keep being too high, and often involve forced labor.

On specific crimes, it comes to light a new section of crimes against the constitution, and religion crimes do not protect specifically Catholicism but freedom of religion, with more lenient penalties. Property crimes, getting a new structure, continue to be punished rigorously. All in all, criminal law is more casuist.

All along the extended period from the reign of Amadeo of Savoy -1870 to 1873- and the First Republic -1873 to 1874- to the end of the Restoration under the Bourbon Monarchy

-1874 to 1923-, mostly under the rule of the 1876 constitution, only some short-reaching criminal law reforms are passed. On sanctions, correctionalism gradually strengthens: the public enforcement of death penalty is abolished -1900-, the time served under remand detention counts for the final prison sentence -1901-, the progressive-treatment correctional system is introduced -1901-, an additional constraint to aggravation of penalties in accumulation of crimes is set -1908-, and suspended prison sentence -1908- and conditional release on parole -1914- transform sentencing and corrections.

On crimes, very rigorous specific criminal laws for fighting banditry -1877-, anarchist terrorism -1894, 1896- and secessionism -1900, 1906- are passed.

4. The 1923 putsch gave rise to Primo Rivera dictatorship, under the Alfonso the Thirteen reign. In this period happens the enactment of a new penal code, the 1928 penal code. Its validity is brief. It comes into force in January 1929 and the 15th of April 1931 is abrogated, being restored the 1848 penal code in accordance with its 1870 version.

1928 code expresses very accurately the state of art of the criminal justice ideology of the time, specifically the endorsement of a double way of sanctioning criminal offences, and it clearly embeds itself in the Spanish correctionalist school. It is a large code, which embraces in there most of the specific criminal law legislation passed during the Restoration and the first period of the dictatorship. For the first time in Spanish criminal law it rules the spatial and temporal framework of application of criminal law. Concerning the system of liability, most remarkable legislative decisions are: Age of majority for criminal liability increases to 16 years old, concealment becomes an autonomous crime, inchoate offences are punished in all cases and, among them, incitement is added to conspiracy and proposal, and finally the concept of continuing offence is admitted. On sanctions appear quite a lot of modifications: On the one hand, a double way of sanctions, penalty and/or safety measure, is introduced; safety measures are mainly envisaged for dangerous criminals, and most serious cases entail indefinite preventive confinement; safety measures may be imposed to legal persons. On the other hand, life imprisonment is abrogated, judicial discretion is promoted, and a more humanitarian trend is noted in the decrease of the legally established lower limits of many offence penalties; additionally, suspended prison sentence and conditional release on parole provisions expand, and cases where default imprisonment does not proceed because of non-payment of a fine penalty are extended. All the same, the frequent imposition of death penalty and

the harsh punishment of too many crimes prevent of describing this code as less rigorous than its predecessor.

Crimes against the state and its institutions and against public order are punished severely. Additionally new sections on crimes against justice administration and against minors appear.

5. The 1870 version of the 1848 penal code maintains its validity during the establishment of the Second Republic and the enactment of the 1931 constitution. Only in December 1932 comes into force a new version, that of 1932, of the 1848 penal code.

1932 version takes as point of reference the 1870 version of the 1848 penal code, though some novelties originated in 1928 penal code are included. It intends to be a code in accord with the new republican legislation and one which lessens the high severity of the 1870 version. Its understanding as an urgent reform, awaiting a brand-new penal code, makes difficult to distance itself, despite what it could be expected given the new political and criminal justice ideals, from 1870 version of the penal code. On liability, the new version remarkably enlarges necessity as a justification ground, passes a new excuse of temporary insanity, retains the 1928 regulation establishing 16 years old as the age of majority for criminal liability, and punishes inchoate offences only occasionally. On sanctions, special prevention joins to retribution and general prevention in the theory of punishment, but not to such an extent as it was in 1928 penal code: Death penalty and life imprisonment are abolished, judicial discretion boosts, accumulation of crimes may not surpass 30 years of imprisonment and, on the whole, harsh punishment of the 1870 version becomes milder. Suspended prison sentence, conditional release on parole and default imprisonment, although already in force, make part of the penal code for the first time.

On specific offences, crimes against the state adapt themselves to new political regime, and religion crimes turn to protect freedom of conscience and freedom of worship. Apart from a lessening of crime penalties, scarce modifications occur. The abrogation of adultery as a crime and, following the 1928 path, the setting of a new section on crimes against justice administration, are most relevant.

Despite the new 1932 version of the 1848 penal code does not takes in the double way of sanctions accepted by the 1928 penal code, the Second Republic enacts in 1933 a specific Law on vagrants and malefactors, which comprises a great number of dangerousness

conditions, include social dangerousness side by side to criminal dangerousness, and provide safety measures to whom have committed a crime and additionally become dangerous as well as to whom, without having committing a crime yet, are considered anyhow dangerous -the latter are precrime safety measures-. All this matches, as it was the case in 1928 penal code, with the then fashioned ideals of the intermediate schools of punishment.

6. The republican legal order ceases at the rebels' side from the breaking out of the Civil War in summer 1936 till its end in spring 1939. The war is over with the rebels' victory, and the Franco dictatorship sets up. Nevertheless, 1932 version of 1848 penal code keeps its force till 1945. Meanwhile, the new political regime passes new specific criminal law legislation¹.

This legislation focuses on several fields of paramount importance for the new regime: Prosecution of those who dissent or have dissented from the ideology of the new political status (1939, 1940, 1941, 1943 laws); the maintenance of a subsistence economy during the civil war and the subsequent II World War (1938, 1939, 1941, 1946 laws); a determined removal of the republican legislation on morals and family issues (1941 law on abortion and contraceptives, 1942 laws on family abandonment, adultery, seduction and abduction). As early as 1938 death penalty is reinstated for diverse common crimes.

A new version of 1848 penal code, now the 1944 reformed code, is enacted in December 1944, coming into force in February 1945. It is an authoritarian piece of legislation, germane to Italian fascist penal code, and not so much with German national-socialist criminal legislation. In this sense, 1944 version observes principle of legality for crimes and penalties and forbids analogy. Concerning the responsibility system, the number of provisions on strict liability swell; impossible attempts are again punished, as well as inchoate offences in all cases; concealment, even affecting misdemeanors, is prosecuted; the number and scope of aggravating circumstances, especially recidivism, is expanded.

The system of sanctions notably hardens. The incorporation to the code of the previous specific criminal law legislation only partially explains that. Its theory of punishment emphasizes retribution and general prevention, but especial prevention inspires a few regulations. Death penalty is reinstated in the code, but not as determinate sentence, and penalties are more severe across the board; again, accumulation of crimes may entail a

¹ Both contenders had reintroduced death penalty for some crimes during the war.

prison sentence up to 40 years. Still, judicial discretion is enhanced as well as suspended prison sentence and, more far-reaching, a generous good time credits system is introduced. The setting of this system is strongly dependent of the difficult management of a very high prison population after the civil war: 200.000 inmates in 1940. This system allows a great majority of inmates to shorten a third of their sentence, what practically is a half if one adds the conditional release on parole. For minors over 16 and under 18 years old a safety measure may be imposed instead of a penalty.

Severity of penalties is specifically shown on crimes against national security, which embrace the safeguard of the existing state, its institutions and public order. Catholic religion is again the sole worship to be protected. Crimes producing food shortage and crimes against property, given the difficult economic conditions of the time, increase their punishment. Crimes against morals and family widen their scope. Forgery, now seen more a hindrance to legal and economic transactions than an attack to state sovereignty, reduces the harshness of its penalties.

Republican Vagrants and Malefactors Law remains in force, with all its safety measures provisions, though new dangerousness conditions, such as homosexuality, are included. This law will be applied until 1970, when it is replaced by a new dangerousness law.

Till the 60's various reforms of the penal code and new specific criminal laws mostly intent to harden or maintain the prosecution of political and social subversion against the dictatorship. In 1963, an important reform incorporates to penal code the contents of previous specific criminal laws. Besides, the good time credits system is enhanced. Same reform proceeds to significant modifications on assault and sex crimes, strongly linked to current moral conceptions; some property crimes are also technically improved. Even more outstanding is 1971 reform, which will entail the 1973 consolidated text of the penal code². The dictatorship is now intending to renew the penal code in harmony with the future political succession, with a bigger political tolerance and with some international obligations. The former explains the introduction of crimes against Crown's heir; the second implies constraints in crimes on political subversion and terrorism³, the partial rebuilding of crimes against Catholic religion into crimes against religious freedom, and

² Before, in 1965 and 1967, new reforms on national security crimes have been passed.

³ Nevertheless, the peak of terrorism during last years of dictatorship will give rise to a severe executive order for preventing terrorism in 1975.

the introduction of crimes against liberty and safety of workers; the latter originates genocide and drug-trafficking crimes.

7. After 1975 dictators' death, political transition to democracy starts. First general elections take place in 1977, and the 1978 constitution is voted in December 1978. Since then to the enactment of the 1995 new penal code almost 20 years go by, while the 1944 version of the 1848 penal code keeps its force. But it suffers very important reforms along this period, which try to accommodate it to the new democratic state of law.

During the ruling of a center party, UCD, until the end of 1982 a succession of reforms is passed, which can be grouped around four main topics: a. Urgent reforms orientated to facilitate reconciliation among Spanish citizenry, by enacting amnesty and pardon laws (1976, 1977) as well as to secure through the penal code political liberties, such as freedom of speech, assembly, manifestation, association, strike, among others (1977, 1978, 1980). b. Preservation of the new legal system against destabilizing behaviors like terrorism or rebellion (1977, 1978, 1979, 1980, 1981). c. Decriminalization of offences protecting moral patterns already left behind, such as adultery, cohabitation, homosexuality, contraceptives trafficking, and reframing others, like seduction and abduction (1977, 1978). d. Moderation of criminal punishment, by reducing the recidivism domain, abolishing death penalty, renouncing to take advantage of new reforms for increasing existing penalties, introducing a more humane penitentiary legislation and restriction of military province (1978, 1979, 1980).

Between 1982 and 1995 rules Spain a socialist government, which promotes numerous criminal law reforms of the 1944 version of the 1848 penal code. Meanwhile, like previous democratic legislatures, government and parliament intend to enact a brand-new penal code. This long-lasting effort finally materializes in 1995. The main reforms of this long period can be classified as follows:

a. Additional adjustment of criminal law contents to constitutional values and criminal guarantees. This is translated into a strict observance of legality and void of vagueness principles, restriction of criminal liability to either intentional or negligent behaviors, and respect for principles of blameworthiness and least possible intervention. Therefore, strict liability practically disappears from criminal law, the scope of recidivism restricts, misdemeanors experience a substantial reduction in number, and minors and military justice are coherently renewed and changed (1983, 1984, 1985, 1986, 1987, 1988, 1989,

1992). b. Until late 80's, sanctions system keeps moderating its severity, but later a hardening takes place, mainly for resolutely fighting against terrorism and drugs trafficking; yet, the rehabilitating institution of suspended prison sentence notably increases its range (1983, 1984, 1985, 1986, 1988, 1989, 1991, 1992, 1995). c. Two emergency criminal legislations take shape, those concerning terrorism and drugs trafficking, notwithstanding its inclusion in penal code. It is difficult to recognize in the legal wording and structure of these offences the full compliance of criminal guarantees (1983, 1984, 1988, 1989). d. Decriminalization of offences against obsolete morals continue, often linked to an enhanced safeguard of individual liberties, like partial decriminalization of abortion, reshaping of sexual crimes round the *sexual freedom* legal interest, and abrogation of blasphemy and gambling and betting crimes (1983, 1984, 1985, 1988, 1989, 1994). e. A resolute advance to the protection of communitarian legal interests is made, mainly socioeconomic assets like copyright, consumers' and workers' health, environment, taxation, as well as to the prosecution of money laundering and public corruption (1983, 1985, 1987, 1988, 1991, 1994, 1995).

8. An event of paramount importance happens in November 1995, the passage of the 1995 new penal code, which replaces the old 1848 penal code. This last code, despite numerous reforms, has been in force for almost a century and a half, apart from the two years brief enforcement of 1928 penal code. However, its enactment is just the outcome of the great number of criminal law reforms, which followed one another during almost 20 years of democratic development. A great number of those reforms are constituent parts of the new code. That is why it can be said that the actual criminal policy divide occurred at the restoration of democracy. All that, without impairment of the copious new and outstanding criminal policy decisions adopted by the new penal code.

The new code is consequence of an intense criminal policy pondering, which had given rise previously to the 1980 draft, 1983 draft proposal, 1990 general part draft proposal sketch, and 1992 and 1994 drafts. All these attempts tried to put Spanish criminal law and criminal policy into line with the most recent international trends, without forgetting country's specific needs.

An analysis of its valuable contents is out of reach now. I am going to briefly mention the guidelines concerning the three pillars of criminal law.

The code proceeds to an accurate systematization of crimes in accordance with the legal interest to be protected. Of course, progress to an enhanced safeguard of personal legal interests is registered, but the massive incorporation of legal assets of the community prominently characterizes the code. Not to forget is the disappearance of almost any kind of specific criminal legislation, mostly included within the penal code: Abortion, electoral crimes, contraband crimes and exchange control crimes are the exception. Apart from penal code, a military criminal code and juvenile justice persist.

On liability, guarantees of legality, subjective attribution, blameworthiness, and least possible intervention, among others, receive strong recognition. So, the four aspects of legality principle, the full interdiction of strict liability, the expansion of blameworthiness excuses, and the punishment of negligent crimes and inchoate offences only occasionally are ruled. Other worth mentioning legislative decisions are abrogation of impossible attempt and separate consideration of the different kinds of perpetration.

On sanctions, prison penalties experience a clear simplification but only an apparent reduction of their severity⁴. This is added to an ambitious discarding of short-term prison penalties, an extension of the number and scope of community penalties, and a thorough transformation of the fine penalty in accordance with the Scandinavian day-fine system. Simultaneously, a constrained system of safety measures is set, which, among other novelties, is limited to post-crime dangerousness of unaccountable or close to unaccountable persons. These provisions imply a too late abolition of the 1970 obsolete francoist Dangerousness Law. Main objective of changes in sanctions system is to ground it on rehabilitation goals better than in general-preventive ones, what is only partly achieved

A Preliminary Title ushers in the new code, encompassing the most prominent criminal guarantees as well as provisions on the scope of application of criminal law. Then, Book I devotes its two first titles to the foundations of criminal liability, while titles third and fourth describe the sanctions system, namely, penalties and safety measures. Book I Title fifth and sixth pay attention to other crime consequences, such as civil restitution, forfeiture, intervention of instrumental legal entities, and biological sample collection. The last title of Book I comprises the regulation of criminal liability extinction and criminal records. Book II include the whole of serious and less serious crimes, starting

⁴ The abrogation of the generous good time credits system of the old code prevents to achieve that intention.

with those against personal legal assets, and finishing with those against interests of international community. Book III rules the third and slightest kind of criminal offences, misdemeanors, also classified in relation to the protected legal interests, and including also some specific provisions on misdemeanors criminal liability.

9. The enactment of 1995 penal code does not stop further criminal law-making. Since 1998 till nowadays more than 30 reforms of penal code, over 40 if we consider the whole criminal legislation, have been passed. It is impossible just to mention all, so that I will focus on the most ambitious ones, those of 2003, 2010 and 2015.

All three 2003 reforms are the starting signal towards a law-and-order model in Spanish criminal justice policy, what entails a sharp hardening of criminal law. General deterrence comes to the fore. This means on sanctions the following: 40 years, instead of 30, becomes the harshest prison penalty for accumulation of crimes, and three months, and not six months, turns to be the lower limit for short-prison penalties Admission to open prison regime and conditional release are made impossible for terrorists as result of truth-in-sentencing enforcement, and many other offenders run into a difficulty to be admitted. Many crimes provisions are modified, such as gender and sexual crimes, property and drug trafficking crimes, among others; common trait of all these changes are addition of new criminal behaviors and penalties, extension of the existing crimes and more rigorous penalties for the latter ones. On liability, more cases are included into the concepts of recidivism and habitual re-offending, and occasionally a crime based on a mere suspicion of guilt is accepted.

The 2010 big reform kept going the expansive and punitive trend of Spanish criminal law, though with some nuances. On liability, the most outstanding decision was the introduction, for the first time in Spain, of the corporate criminal liability. On sanctions, new provisions are introduced for imposing safety measures to accountable persons, more precisely, release under supervision, which blatantly contradicts the option of 1995 penal code in favor of confining safety measures to unaccountable and close to unaccountable persons. A great number of crimes, even more than in 2003, get modifications: Sexual crimes are again expanded and aggravated, same happens to numerous property and socioeconomic crimes. Besides, specific attention is paid to organized crime, with pronounced enlargement of definitions of crime as well as aggravations in terrorism and human trafficking; additionally, two autonomous offences punishing just membership to

criminal organizations or groups are built. But drug trafficking crimes lessen to some extent their punitiveness.

2015 reform builds the most extensive reform of 1995 penal code for the time being, with 260 provisions of modification out of a code containing around 600 paragraphs. Among the most important changes, should be mentioned, on liability, a new regulation, far more permissive, of the corporate criminal liability, only 5 years after the first introduction of this kind of responsibility. On sanctions, life imprisonment is restored, being out of our legal system since 1928, practically since 1870, just in a time when Spanish crime rates are lower than ever since statistical figures are collected; also, conditional release regime becomes tougher. On crimes, an ambiguous abrogation of all misdemeanors take place - Book III of the penal code-, that is so because over 60% of all misdemeanors are not abolished but become a new category of *light crimes*, often more punished than the original misdemeanor. Also, crimes against human life incorporate new aggravated definitions; sexual crimes are once more aggravated, and this time the rising of maturity age for sexual consent up to 16 years is additionally included; new and significant aggravations in property crimes are set. Another same year criminal law reform modifies the terrorist crimes of the code, now at the expense of Islamic terrorism, enhancing once again their scope and punishment.

10. I am not going to mention the scarce specific criminal law legislation, which persists outside the 1995 penal code. It partly will be dealt with in later speeches by my colleagues. It is constrained to two special jurisdictions, juvenile justice, fully renewed in 2000, and 2015 military penal code, in substitution for 1985 military penal code. In addition, some criminal provisions exist in laws regulating exchange control and capital flows, contraband crimes, electoral crimes and abortion.

Worth to mention is also the penitentiary legislation, built on a very modern penitentiary law, passed as early as 1979