

Basic principles of criminal law.

Structure of criminal liability in Spanish Criminal Law.

I. Basic principles of criminal law.

1. Criminal law is just one among other subsystems of social control, mostly non-juridical -family, education, neighborhood, religion, social interactions...-, which strive under a similar set of values to secure a social order where an orderly and peaceful social life is possible. Criminal social control characterizes for focusing on the protection of the most prominent legal interests against their most outstanding violations; for deploying, for the sake of its preventive goals, the most serious social sanctioning reactions; and, consequently, for the establishment of a strict regime of individual guarantees, which intend to safeguard citizens' rights against abusive interventions of the institutions exerting the right to punish.

2. Criminal law structures around three main set of principles, which are paralleled by its three basic components. First, legislative decisions about the legal assets which criminal law intends to protect must be made observing following principles: Criminal law solely intervenes to counteract very serious harmful behaviors (harmfulness and parsimony principles), against interests affecting to the public (public interests' principle), which cannot be prevented by other less aggressive means than those of criminal intervention (subsidiarity principle). All those principles should be observed in establishing the specific catalogue of criminal law protected legal assets, and in deciding whether those assets must be guarded once harmed by a criminal behavior, or, before, once in danger of being harmed by a criminal behavior (harm and danger crimes).

Secondly, criminal law intervention against behaviors which harm or endanger those legal assets needs to verify that a person is responsible for such harmful or dangerous behavior. To this end, following principles must be observed: The forbidden behavior and its sanction should be established in a law and were strictly determined (legality and void for vagueness principles), responsibility links to an specific overt behavior (non-punishment of mental attitudes or ways of life principle), this behavior can be objectively and subjectively attributed to a person (personal attribution principle), who, according to his/her personal conditions, was able at that time to observe criminal law regulation

(blameworthiness principle), and, finally, verification of previous requirements compliance is made abiding due process demands (jurisdiction principle). To shape all this, we need a set of norms, either prohibitions or commands, exceptionally permissions, which assess and direct citizens' behaviors, as well as a comprehensive legal theory of crime that must within embrace all features a human behavior should have for law being entitled to make a person criminal responsible for that.

Thirdly, imposing a sanctioning reaction to a person responsible for a crime entails the abidance of three main principles: First, certain sanctions stand out of question, no matter the seriousness of the crime committed, because they are inhuman (humanity principle). Additionally, criminal sanctions must pursue a socially acceptable crime preventing effect (theory of punishment), namely, deterrence, rehabilitation or incapacitation on the offender, deterrence, integrating prevention or communicative prevention on the public. Finally, severity of sanctions must be commensurate with the harm caused by the crime (proportionality principle). Main tools for implementation of criminal sanctions are penalties and safety measures.

3. Spanish criminal law is strictly submitted to legality principle (arts. 1 to 4 CP¹). It means, under a formal standpoint, that no crime, no dangerous condition, no penalty, and no safety measure may be enforced if they are not previously foreseen in a parliamentary ordinary law, most preferably in a parliamentary reinforced law (organic law). Additionally, penalties and safety measures must be imposed and enforced closely abiding the current legal procedure. All this makes other legal sources, such as non-parliamentary statutes, customary law, or general principles of law, to play a secondary role.

From a substantial standpoint, legality principle means that legal provisions establishing crimes and penalties must be precise worded (void of vagueness), and no analogical application of criminal law, except for the benefit of the defendant, is allowed (prohibition on analogy).

4. Concerning temporal scope of criminal law, principle of non-retroactivity of criminal provisions ordinarily rules. It prevents the application of any criminal law provision to a behavior committed before that provision came into force. An exception

¹ See arts. 3 and 21 Ph. PC.

for this principle occurs when subsequent legal provision is more favorable for the defendant or sentenced than the one in force at the time of committing the crime; in this case later legal provision can be applied (art. 2 CP²).

For the spatial range of criminal law, territoriality principle usually rules. According to it, all Spanish criminal provisions are applicable to any Spanish or foreign person, who commit a crime in Spanish territory. But this principle must be complemented and can be occasionally replaced by following principles: Principle of active personality allows the application of Spanish criminal law to Spaniards who are located at the time in Spain, although they have committed the crime abroad, provided that the behavior is a crime in the country of commission as well as in Spain. Principle of protection of state's interests assures that Spanish criminal law may be applied to Spaniards and foreigners, who have committed a crime abroad, provided that the offence be one of those mentioned at the Organic law of the Judiciary because they endanger the Spanish political order or its institutional performance. Principle of universal jurisdiction allows to claim Spanish jurisdiction for prosecuting any criminal offender committing his/her crime in any jurisdiction, provided that the crime, as stated by either international or Spanish legislation, affects international community assets and the prosecution requirements of Spanish legal order are met (art. 23 LOPJ³).

II. Structure of criminal liability.

1. Next, I am going to describe those characteristics a behavior and a person must have to declare the latter liable for a commission of a crime⁴. Modern continental criminal law theory bases on an analytical theory of crime. It means that criminal liability rests on the accumulation, either in the behavior or in the person who has carried out that behavior which can be defined as a crime, of five attributes. These attributes, called categories of crime, have among them a logical-necessary successive relationship: All of them must be present for adjudicating criminal liability to an individuum, and, additionally, the absence of one previous category stops the verification of latter categories and a conclusion of no

² See arts. 21 and 22 PhCP.

³ See art. 2 PhPC.

⁴ This topic corresponds to the second set of questions dealt with in section 1.2.

criminal liability must be drawn. Each category contains a differentiated assessment of the behavior or of the person who has committed that behavior.

This criminal liability framework makes possible a correct distinction of criminal behavior from other non-criminal but related behaviors, allows a precise subsumption of facts into law, and explicitly brings to light each and every negative assessment any crime deserves or needs. Specifically, any criminal behavior must be either an action or an omission, legally defined as crime, wrongful, blameworthy and punishable. In Spain, this analytical concept finds recognition in art. 10 CP, complemented by other provisions of Book I Title I CP⁵.

2. Spanish criminal offences are divided into serious crimes, less serious crimes, and light crimes, and they are included almost in its entirety, within the current penal code, because of the very few existing specific criminal laws⁶. The gravity of a crime is determined by the seriousness of its foreseen penalty, without existing any systematic distinction among them within the penal code (art. 13 CP). This is because all crimes, irrespective of their seriousness, group in the penal code according to the legal asset they harm.

3. *An action or an omission.*

a. Any criminal behavior must be either a human action or a human omission (art. 10 CP). This means, first, that the subject committing a crime is a human person⁷ and, secondly, that the behavior has qualities human behavior's own. This category must be comprehensive, for embracing all criminal meaningful conducts, mostly value neutral, for not anticipating assessments linked to latter theory of crime categories, and able to identify from the beginning behaviors which manifestly do not concern to criminal law.

No single concept comprises all these requirements, what makes necessary to use a double concept of action and omission in this first category. Human action is understood as one or various physical movements of an agent directed by his/her will to bring about a transformation in the outside world in accordance with his/her goal, while human

⁵ See art. 3 p. 1 PhPC.

⁶ See arts. 9 and 10 PhPC.

⁷ The recent introduction of legal entities as agents of crime poses specific questions on the understanding of criminal liability, and it explains why this matter is going to be dealt separately.

omission is a non-performance of a human action being the agent capable to achieve that action.

b. These definitions of action and omission preclude from consideration by criminal law following facts: Agent's movements, which are not managed or manageable by agent's will, among others, reflex movements or movements done, or not done, under irresistible physical force⁸. Also exclude all agent's psychological movements, which do not finish transcending in the outside world, such as thoughts, mental attitudes, motivation processes, even decisions of taking, or not taking, an action, if they do not end in an external behavior (principle of non-punishment of mere thinking).

c. In those often occasions when the agent intends by an action or an omission to give rise to an external result, clearly separated from own's behavior, the incorporation of that result to the human action or omission requires respectively, either that the agent's movements originated a causal connection which has precisely generated the result, or that the generation of the result can be attributed to the absence of action. Therefore, all harmful effects, which cannot be considered results caused by a human action or attributable to a human omission do not belong to the contents of criminal human action or omission, and consequently to criminal law.

4. An action or omission *defined as crime*.

a. A certain human action or omission will become a crime when it is described, with its specific constituent parts, as a crime in a legal provision of the penal code or of the specific criminal law legislation (art. 10 CP⁹). The legal description of a criminal behavior must explicitly or implicitly enshrine objective and subjective components. The former ones build the objective part, and the latter ones the subjective part, of the whole criminal behavior.

In turn, the defined crimes can be classified, in accordance with its active or omissive nature and its intentional or negligent performance, as intentional commission crimes, negligent commission crimes, intentional omission crimes and negligent omission crimes. We start analyzing the constituent parts of any intentional or negligent commission crime,

⁸ See art. 12.5 PhPC.

⁹ See art. 3 p.1 PhPC.

and later we show the differences between these kinds of crimes and the intentional and negligent omission crimes.

b. *Commission crimes*. Objective part.

i. A crime can have three differentiated frameworks: A *conduct crime* is a crime which is fully achieved once the human external behavior is completed, being disregarded possible outcomes originated by that behavior: possession of children's pornographic materials is an example (art. 189.5 CP). A *result crime* is a crime which is only completed when the external behavior triggers a causal relationship, which gives rise to a separate outcome in the outside world, being all these elements constituent parts of the result crime; a homicide action causes the victim's death (art. 138 CP). Additionally, three kinds of *danger crimes* exist: *Abstract-danger crimes*, substantially equivalent to conduct crimes, justify their autonomous existence because the external behavior, instead of directly harming the legal asset (conduct crime), generally create a danger to the legal asset, no matter if it is probably to happen in the singular case; driving under the influence of alcoholic substances (art. 379.2 CP). *Capable abstract-danger crimes*, when the accomplished specific external behavior is dangerous, because a harmful outcome is probably going to happen as its consequence; adulteration of foodstuff intended for marketing (art. 364 CP). *Specific-danger crimes*, also called danger-result crimes, when the dangerous specific external behavior directly encounters the material object or person to be protected, being the harmful outcome impending, no matter if the outcome finally occurs; manifest and intentional recklessness driving, specifically endangering a person's life (art. 380.1 CP).

ii. The description of the behaviors and, if necessary, of the effects belonging to the above-mentioned crime frameworks, needs the use of not only *descriptive elements*, namely, those referring to facts which are perceptible by our senses, but also *normative elements*, which demand either a cognitive or an evaluative endeavor for their comprehension. Thus, for the latter, detriment of reputation, in insult crime (art. 208 CP), movable thing, in theft (art. 234 CP), or obscene exhibition, in exhibitionist crime (art. 185 CP).

iii. In result crimes may happen that, despite the existing causal relationship between the committed behavior and the outcome it brings about, this outcome was not attributed

to the previous behavior. Certain evaluative judgments, namely, the criteria for *restriction of objective attribution of results*, draw the conclusion that it is illegitimate to attribute a result to its causing behavior when this behavior was not initially dangerous, when it was carried out observing due care¹⁰, or when that result because of that behavior was not under the scope of the legal provision prohibiting such behavior.

iv. Finally, some crimes, called *special offences* versus common offences, may be solely committed by agents meeting some personal conditions required by law, e.g., being a civil servant or a judge. Similar behaviors committed by agents not having those requirements can be sometimes, but not always, punished through a common crime (improper special offences versus proper special offences). This is the case by illegal detention v. arbitrary detention, but no common crime equivalence exists for perversion of the cause of justice crime (arts. 530 v. 163, and 446 CP).

c. Commission crimes. Subjective part.

i. When committing an *intentional crime*, the agent knows he is performing the kind of objective behavior, which one verifies it is embraced by the legal definition of crime, and he wants to perform it¹¹. This knowledge and will (intellectual and volitional element) include, if necessary, the causation of an outcome like the one which can be verified is constituent part of the legal definition of crime.

Believes mistakenly the agent he is doing a behavior distinct from the one stated in the definition of crime, a *mistake of fact* is given (art. 14. 1 and 2). If the mistake is *unavoidable*, no crime is committed by the agent and there is no criminal liability. If the mistake is *avoidable*, because the agent was able to prevent it from happening, a negligent responsibility, if legally provided, must be applied.

Additionally, the intent to commit a behavior can have different kinds of intensity. Taking the result crimes as example, a *direct intent* will exist when the agent primarily wants to achieve that result. An *oblique intent* happens when the agent is aware that the achievement of the aimed result, illegal or not, will necessarily produce the criminal result and he/she assumes that consequence. An *inconsiderate intent* (*dolus eventualis*) occurs when, reckoning the agent the causation of the criminal result as a likely consequence of

¹⁰ In negligent crimes, because the result is not as its closest related to the committed careless behavior.

¹¹ See arts. 3 pp. 2 and 3 PhPC.

bringing about the aimed result, illegal or not, he/she behaves regardless thereof. However, the kind of intent's intensity is irrelevant, unless some exceptions.

ii. A *negligent crime* is committed when the agent is not aware nor wants to perform the kind of objective behavior, which one verifies it is embraced by the legal definition of crime. But the objective criminal behavior happens, because he/she behaves in such a careless way that he/she does not abide the due care required for doing that behavior in accordance with societal standards for preventing harm¹².

If an agent has not anticipated that his/her behavior matched the kind of objective behavior, which one verifies it is embraced by the legal definition of crime, or that a criminal result was going to be derived from that behavior, even being able to foresee both, we meet *unconscious negligence*. Has the agent anticipated that his/her behavior matches the kind of objective behavior, which one verifies it is embraced by the legal definition of crime, or that a criminal result was going to be derived from that behavior, and in spite of that behaves so, just being confident that neither the objective criminal behavior nor its result are going to take place, then *conscious negligence* is met.

Negligent crimes are punished on few occasions. The specific crime provision must expressly state that the crime is not only as intentional but also as negligent crime punished (art. 12 CP¹³). Exceptional punishment of negligent crimes was established for the first time in Spain by 1995 penal code. The traditional punishment of any negligent crime, by means of three general legal clauses, punished across the board all behaviors defined as crime when negligently committed.

iii. No other criminal liability is provided apart from intentional and negligent crimes. Strict liability is not foreseen (art. 5 CP). Those legal provisions which once punished as intentional outcomes those not covered by either an intentional behavior or a negligent one, the latter embracing an unwilling but foreseeing as well as an unforeseen but foreseeable behavior, are abolished (prohibition of *versari in re illicita*); e.g., intentional injuries producing a hazardous death, were previously punished as intentional death, though meeting a mitigating circumstance. Same applies to so called *crimes qualified by a more serious result*, either hazardous or negligent, where the previous commission of

¹² See art. 3 pp. 2 and 3 PhPC.

¹³ See art. 365 PhPC.

an intentional crime made that any negligent, even hazardous, more serious outcome deriving from that intentional crime should be considered intentional, e.g. intentional abortion giving rise to the pregnant's hazardous death, were previously punished by a specific crime which provided a penalty equivalent to intentional homicide¹⁴.

d. Omission crimes.

i. When a criminal provision imperatively commands to perform an action, the corresponding crime resides in not doing the ordered action, e.g. failure in the duty to assist (art. 195). They are different from commission crimes, where the criminal provision bans to perform an action. There are *proper* and *improper omission crimes*, and both kinds embrace intentional and negligent omission crimes.

ii. The objective part of proper omission crimes consists in the appearance of a dangerous situation -typical situation-, where a prescribed action is commanded to the agent, but this agent, having the capability to perform that action, doesn't whatsoever. The subjective part is built upon the intent, namely, knowledge and will of not doing the prescribed action, or upon a negligence, which has as consequence the non-realization of the prescribed action.

iii. The objective part of improper omission crimes, which structure is parallel to that of the result commission crimes, includes above-mentioned components of the proper omission crimes, but it adds a few more (art. 11 CP): The agent must be subjected to an specific mandate of action to prevent a particular harmful result from occurring (guarantor position); the omission consisting in the non-prevention of the harmful result merits a socially negative appraisal equivalent to that of the corresponding action -assessment equivalence between omission and action-; and the caused harmful result may be attributable to that omission. Same as proper omission crimes, all objective components must be embraced by the subjective part, namely, they have taken place intentionally or negligently.

5. A criminal *wrongful* action or omission.

a. In most cases, once checked that the committed behavior corresponds to that of a criminal provision, may be stated that the behavior not only matches with the definition

¹⁴ See art. 3 pp. 2 and 3, art. 4.1, art. 12.4, art. 13.3 PhPC.

of a crime, but it is a wrongful or illicit behavior. This is because legal provisions defining crimes simultaneously determine the unlawful character of the defined crime. However, the wrongdoing of a particular criminal behavior will be only categorical when the existence of a justification clause can be excluded in that case. Being applicable a justification ground to the committed criminal behavior, this behavior will remain criminal, but lawful for all purposes, not any more illegal, and no criminal liability will exist.

b. Justification clauses are permission rules, which allow the commission or omission of the criminal prohibited or commanded behavior provided that some circumstances occur. These circumstances are so outstanding that nullify the judgment of unlawfulness originally founded on the definition of crime. There are five general justification clauses, plus some others specifically addressed to certain crimes, in our legal system. The general justification grounds are (art. 20.4, 5, 7 CP¹⁵) i. Self-defense, including defense of others, ii. Necessity, including own's and other's necessity, and provided that the more important legal asset is safeguarded, iii. Fulfillment of a duty, iv. Legitimate use of own's right, v. Victim's consent.

c. Once established a criminal wrongful behavior because no justification ground is present, a few aggravating or mitigating circumstances must be taken into account (arts. 21 and 22 CP¹⁶). These circumstances apply, if present, to any crime, and grade the already set up wrongdoing of the behavior, be attenuating be aggravating the judgment of wrongfulness. Among these circumstances to be considered, the partial existence of a justification ground has, under certain conditions, strong qualified consequences on the level of wrongdoing (art. 21.1 CP¹⁷).

6. A criminal, wrongful and *blameworthy* action or omission.

a. The achievement of a criminal wrongdoing behavior means that the behavior has infringed the criminal law norm. But this is not enough for establishing a criminal liability. Besides, it is needed that the agent may be blamed because he/she committed a criminal wrongdoing behavior having personal conditions for avoiding that behavior, in other words, despite his/her personal ability to behave in accordance with the law. This

¹⁵ See art. 11 PhPC.

¹⁶ See arts. 13 and 14 PhPC.

¹⁷ See art. 13.1 PhPC.

blameworthy judgment will be regularly expressed whenever the agent's conduct has been decided and performed under normal motivational conditions. Because it is assumed that, as a rule, common persons are capable to make up free decisions on theirs' own. Nevertheless, occasionally this assumption can be questioned to a greater or lesser extent, what gives rise to the consideration of criminal liability *excuses*.

b. A first group of them refers to situations when the agent lacks, at the precise moment of committing what will be a criminal and unlawful behavior, the capability to behave himself in a different way as he/she does. These are the *accountability* excuses, which in the Spanish legal system are the following (art. 19, art. 20.1, 2, 3 CP¹⁸): i. Insanity, which comprises the most serious mental diseases or defects, as well as temporary mental disorders, ii. Full intoxication by consumption of substances, including among them those of alcoholic origin, opiates, coca and cannabis derivates, psychotropics and any industrial intoxicating substances, iii. Withdrawal syndrome, linked to the deprivation of the intake of some of these substances which originate mental of physical dependency, iv. Perception disturbances causing serious disturbances of social life insight, such as deaf-muteness or blindness, iv. Minority under 14 years old¹⁹.

c. If established the agent's capability of behaving differently than he/she did, may happen that the agent did not know, even could not know, the behavior was breaking the legal system, namely, it was wrongful. We are not referring to a misunderstanding on the real nature of the committed behavior, which leads us to the mistake of fact, but to a situation where the agent, correctly knowing the true characteristics of the committed behavior, believes the conduct is not breaking criminal law. This mistake, known as *mistake of law*, amounts to an error on the unlawful quality of the behavior (art. 14.3 CP). It can refer both to the erroneous belief that the behavior is not a criminal defined behavior and to the erroneous belief that the behavior, rightly understood as criminal, is covered by a justification ground; in both cases the agent believes the behavior is not wrongful. So, the agent thinks there is no tax crime in the corresponding legal system (first case), or the agent thinks that abortion is legally justified when pregnancy caused by rape, ignoring that abortion is punished in any circumstances in that country (second case). Being the

¹⁸ See art. 12.1 PhPC, and Section 6 R.A. n° 9344. Also art. 13.8 and 9, 15 p. 3 PhPC.

¹⁹ Between 14 and 18 years old, minors are accountable but in a diminished sense, which entails the exclusive application of juvenile law to them.

mistake unavoidable, lack of blameworthiness precludes criminal liability, being an avoidable mistake, a diminished criminal liability will follow.

d. Incidentally, the accountable agent who either knows or is capable to know the wrongfulness of his/her behavior is involved into such an exceptional and personally troublesome situation that law is prepared to exonerate him/her from the non-abeyance of the law. These cases give rise to several defenses (art. 20.5, 6, art. 454 CP²⁰). Those generally applicable are, i. Necessity, when conflicting legal assets have equivalent social value, ii. Unsurmountable fear, and iii. Relatives' concealment.

e. Like for wrongdoing category, there exist mitigating and aggravating circumstances, which elicit either a decrease or an increase in the amount of the initially established blameworthiness and are valid for all crimes (arts. 21 and 22 CP²¹). Additionally, the partial existence of the above-mentioned excuses generates under certain conditions a strong diminution of blameworthiness (art. 21.1 CP²²).

7. A criminal, wrongful, blameworthy, and *punishable* action or omission.

a. While all previous categories of criminal responsibility intend to confirm that the agent *deserves* to be deemed criminally liable, it is still needed an additional assessment before establishing a definitive criminal liability of the agent. The category of punishability verifies if there is also a *necessity* for declaring the agent criminally liable. This is a utilitarian judgment, which aims to discard the existence, in the agent or in his/her behavior, of some qualities or circumstances that make more convenient either to refuse agent's criminal liability or to diminished agent's existing criminal liability.

b. It may happen that the enforcement of criminal law gains *effectiveness*, namely, its abidance will be better secured, if a renunciation to adjudicate criminal liability is decided. This is the case, for instance, when a particular person reports a bribery, he/she has suffered (art. 426 CP). It may be also adequate to rule a diminution on criminal liability when the offender has at an early stage and spontaneously confessed the committed crime (art. 21.4 CP²³).

²⁰ See arts. 12.6 and 7, 20 PhPC.

²¹ See arts. 13 and 14 PhPC.

²² See 13.1 PhPC.

²³ See art. 13.7 PhPC.

Sometimes occur that criminal law *efficacy* for safeguarding legal assets increases when, e.g., there is a legal provision which drops criminal liability of those tax evaders who hurry to deposit the cheated overdue taxes in the Treasury before prosecutor's office opens a preliminary enquiry (arts. 305.4 and 307.3 CP), or criminal liability diminishes because the agent strives, and succeeds, to redress the damage caused by the committed crime (art. 21.5 CP).

Finally, in some cases an adjudication of criminal liability entails costs which are far higher than the benefits linked to such an adjudication. This *efficiency* weighting is the rationale behind parliamentary inviolability for expressions and deeds while exercising their duties (art. 71.1 CE) or explaining the kinship defense in favor of agents committing crimes against property without violence nor intimidation (art. 368 CP²⁴).

²⁴ See art. 332 PhPC.