



PRINCIPLES THAT LEGITIMISE AND RESTRAIN CRIMINAL LAW

Lesson 2

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PRINCIPLES RESTRAINING CRIMINAL LAW

Abbreviations used

CrimC – Criminal Code

SConst/Const- Spanish Constitution 1978

ConstCttt- Constitutional Court

ECtHR- European Court of Human Rights

ECHR- European Convention on Human Rights

TFEU- Treaty on the Functioning of the European Union

PRINCIPLES RESTRAINING CRIMINAL LAW

SUMMARY

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PRINCIPLES RESTRAINING CRIMINAL LAW

0. INTRODUCTION.

0.1. What is a principle?

- There are several meanings of the term. However, the principles we study in this lesson are related to the following two definitions:

a) A less determinate and therefore more vague type of rule:

E.g., the principle of legality and the principle of culpability

b) Mandates of optimisation, which require their compliance as much as possible but are defeasible before other applicable legal rules

E.g., the harm principle and the principle of minimal criminalisation

PRINCIPLES RESTRAINING CRIMINAL LAW

0. INTRODUCTION.

0.2. Origin of these principles.

- Current Criminal Law is a by-product of Liberalism, the ideology of the bourgeoisie, which demanded two basic elements from the State:

- a) **Liberty** (more individual freedom) in the form of individual rights and liberties for all citizens, and

- b) **Equality**, i.e., the right to be treated on an equal footing with the ruling classes in the eyes of the law.

- After the successful liberal revolutions, these rights and liberties were enacted. This implied **the beginning of the Rule of Law** (*Estado de Derecho*), a State that is governed by rules and should respect the fundamental rights and liberties of its citizens.

- The principles we study in this lesson stem from these two “meta-principles”.

PRINCIPLES RESTRAINING CRIMINAL LAW

1. PRINCIPLE OF LEGALITY

1.1. Notion, origin and evolution.

Notion: Criminal law can be authorised only by a **general** law of parliament, which should **be enacted in force before the offence is committed, interpreted by judges as strictly as possible in accordance with the wording of the law, and applicable only to the cases expressly provided for in the law.**

PRINCIPLES RESTRAINING CRIMINAL LAW

1. PRINCIPLE OF LEGALITY

1.1. Notion, origin and evolution.

The **roots** of the principle lie in the core ideas of **liberalism**:

a) the **idea of liberty** (personal freedom), because the principle of legality restrains the power of the State:

- No offence or punishment is possible without the will of Parliament.
- Neither the Government nor Parliament is allowed to establish the punishment for an offence after its commission.
- Criminal law should be interpreted with the maximum certainty, and analogy is prohibited. The law of Parliament should not be distorted by judges, who should be only “the mouthpiece of the Law”

b) the **idea of equality** (formal): law passed by Parliament ensured that all citizens were treated equally and that there were no different legal regimes based on social class.

PRINCIPLES RESTRAINING CRIMINAL LAW

1. PRINCIPLE OF LEGALITY

1.1. Notion, origin and evolution.

With the success of the liberal revolutions, the principle of legality crystallised in various bills of rights that were enacted at the same time as the organic constitutions.

- e.g., Art. 8 1789 Declaration of the Rights of Man and of the Citizen is the most well known but before this these rights had also been recognized by the Declarations of Rights of Philadelphia (1774), Virginia (1776), and Maryland (1776), *inter alia*.

- Later, constitutions began to include the Bill of Rights in the same constitutional text (as in most of the historic Spanish constitutions).

PRINCIPLES RESTRAINING CRIMINAL LAW

1. PRINCIPLE OF LEGALITY

1.2. Contents of the principle of legality.

1.2.1 Guarantees of this principle apply to the various stages involved in Criminal Law:

1.2.1.1. Crime: No conduct should be punished without a previous legal provision declaring it to be a criminal offence (*nullum crimen sine praevia lege*).

1.2.1.2. Punishment: No offence should be punished without a previous legal provision establishing a penalty for this offence (*nulla poena sine praevia lege*).

1.2.1.3. Jurisdiction: No punishment should be inflicted without prior and final judgement in accordance with the due process of law.

1.2.1.4. Execution: Punishment should be enforced or executed in accordance with the law.

PRINCIPLES RESTRAINING CRIMINAL LAW

1. PRINCIPLE OF LEGALITY

1.2. Contents of the principle of legality.

1.2.2 Material content of the principle.

1.2.2.1 *Lex scripta*: Offences and punishments should be defined by statute alone.

1.2.2.2. *Lex praevia*: No conduct should be considered a criminal offence or punishable by a specific penalty unless a law has been enacted and entered into force before the offence is committed.

1.2.2.3. *Lex stricta*: Criminal law applies only to the cases clearly stated in the norm extracted from the text of a statute. Analogy is prohibited.

1.2.2.4. *Lex certa*: Criminal laws should be drafted and interpreted as clearly and unambiguously as possible in order to avoid vagueness or ambiguity.

PRINCIPLES RESTRAINING CRIMINAL LAW

1. PRINCIPLE OF LEGALITY

1.3. Principle of legality in the Spanish Constitution

Article 25.

Nadie puede ser condenado o sancionado por acciones u omisiones que en el momento de producirse no constituyan delito, falta o infracción administrativa, según la legislación vigente en aquel momento.

Article 25.

1. No one may be convicted or sentenced for any act or omission which at the time it was committed did not constitute a felony, misdemeanour or administrative offence according to the law in force at that time.

PRINCIPLES RESTRAINING CRIMINAL LAW

1. PRINCIPLE OF LEGALITY

1.3. Principle of legality in the Spanish Constitution

- According to the content of the principle of legality, the formulation of the principle of legality in our Constitution is deficient because it includes only the prohibition of retroactive laws and a deficient account of the *lex scripta* mandate (*legislación*). The other guarantees are not included in the text.
- Nevertheless, the Constitutional Court has gradually recognised all the various contents of the principle of legality, which are now fully consolidated in its case law.

PRINCIPLES RESTRAINING CRIMINAL LAW

1. PRINCIPLE OF LEGALITY

1.4. *Lex scripta* (Criminal Law should be defined by statute alone). Sources of criminal law.

1.4.1. Definition of Criminal statute: It is the expression of the will of the Spanish Parliament (Cortes Generales), in accordance with the procedures laid down in the Constitution, to establish rules of conduct that are binding, both to the powers of the State (executive and judiciary) and the citizens.

1.4.2. Types of statutes in Criminal Law

There is no debate about the fact that criminal law must be defined only by statute, or about the impossibility of regulating criminal law by customary law or by regulations (reglamentos).

- The crux of the debate is *whether all matters relating to criminal law must be regulated by organic law*, even though the practice to date has been to regulate all criminal law by organic law.
- ConstCt has established that only those offences punished with prison should be regulated by Organic Law, since the fundamental right to freedom is affected (Art. 81.1, in connection with Art. 17.1 Const.): among other judgments, [Judgment ConstCt 140/1986, 11 November 1986](#).
- This position does not consider important points: a) monetary fines are replaced with prison sentences or other forms of liberty-restricting penalties (Art. 53 and 35 CrimC); b) all sentences may be violated, whether or not they are punishable by imprisonment, and subsequently these acts are punished as the offence of violation of a sentence (Art. 468 CrimC), which is also punishable by imprisonment.
- Therefore, the principle of absolute reservation of organic laws is applied in criminal law because they directly or indirectly restrict fundamental rights. Organic laws do not have a superior normative hierarchy but are merely the expression of specific competences and cannot be delegated or approved by popular.
- Act 209/1964, of 24 December, of the Criminal and Procedural Law of Air Navigation is *the only ordinary act which is still in force*. Its endurance can be attributed to its pre-constitutional origin as well as to the numerous amendments introduced over the years in accordance with the Constitution in force.

PRINCIPLES RESTRAINING CRIMINAL LAW

1. PRINCIPLE OF LEGALITY

1.4. *Lex scripta* (Criminal Law could only be defined by statute). Sources of criminal law.

1.4.3. Legislative procedure for Organic Acts

- *Procedure of approval by the Cortes Generales:*
 - a) Organic bills require an absolute majority of Congress (176 members) to approve them in a final vote on the project. The Senate may propose amendments, including on issues reserved for Organic Acts, but Congress has the final say.
 - b) Approval is the pivotal moment in the legislative process; derogation based on incompatibility must therefore align with the moment of approval (Lesson 3, point 1.2.2.2).
 - c) It is fairly common to find two proposals on the same topic, one regular and the other organic (for instance, encompassing jurisdictional or criminal features), both of which are dealt with concurrently by the same authorities and within identical timeframes.
 - d) Royal Sanction and Promulgation (Art. 91 SConst): “The King shall, within a period of fifteen days, give his assent to the laws passed by the Cortes Generales, and shall promulgate them and order their immediate publication”.
- *Publication (Art. 2.1 Civil Code): The legislation will come into effect twenty days after its complete publication in the "State's Official Gazette" (Boletín Oficial del Estado), unless expressly stated otherwise. It is common for special provisions to define the moment that statutes come into force (Lesson 3, point 1.1.2).*

PRINCIPLES RESTRAINING CRIMINAL LAW

1. PRINCIPLE OF LEGALITY

1.4. *Lex scripta* (Criminal Law could only be defined by statute). Sources of criminal law.

1.4.4. Other sources of the law.

- Customary law: It is not feasible to utilise customary law as the basis for creating a valid Criminal law due to the absolute reservation for law, particularly for an organic statute, as stated in Art. 25.1 of the Constitution. The SC has repudiated the application of customary law, even for international customary law, which is exemplified in the judgment of SC 798/2007 (1st Oct. 2007, Scilingo).
- Constitutional Court decisions: The Constitutional Court is primarily understood as a negative legislator since it can declare as void legal provisions (as per Art. 164 SConst, Art. 39, and 40 of the Organic Act on the Constitutional Court) and interpretations thereof through the application of interpretative rulings (as per Art. 40.2 of the Organic Act on the Constitutional Court).

PRINCIPLES RESTRAINING CRIMINAL LAW

1. PRINCIPLE OF LEGALITY

1.4. *Lex scripta* (Criminal Law could only be defined by statute). Sources of criminal law.

1.4.4. Other sources of law.

- *International Treaties* (Art. 94 to 96 Const): International treaties establishing criminal offences cannot be applied in Spain without the enactment of a Spanish organic statute acknowledging those criminal offences as internal law.
- *European Union Criminal Law* is applicable only if there is a specific Spanish organic statute transposing a specific criminal offence. ***Supremacy and direct effect are not applicable in criminal matters.***
- Criminal law reforms with their origin in the European Union are increasingly common in cases of harmonisation of legislations, either as autonomous harmonisation (competence of the European Union according to the treaty in specific manner, Art. 83.1 TFEU) or as so-called ancillary harmonisation, which is foreseen for cases where criminal harmonisation is necessary to ensure non-criminal harmonisation (e.g., the preservation of the natural environment, which directly affects commercial concurrence, and criminal legislation interferes in commercial concurrence, Art. 83(2) TFEU).

PRINCIPLES RESTRAINING CRIMINAL LAW

1. PRINCIPLE OF LEGALITY

1.5. *Lex praevia* (prohibition of harsher ex post facto laws/prohibición de las normas penales desfavorables)

- No conduct should be considered an offence, or punished by a specific penalty, if a norm has not been enacted and come into force before the offence has been committed.
- “In force period” (*vigencia*) and “time of the commission of the offence”. A detailed explanation of applicability will be provided in Lesson 3 but to comply with the *lex praevia* requirement the statute containing the norm to be applied should be in force (first approved and published (existence) and then come into force) when the offence is committed. The application of any posterior statute that is harsher for the accused should be deemed retroactive.
- A distinction can be made between “linguistic expressions” within a statute and “norms” that result from the interpretation of language (Lesson 1). This distinction allows for modification of the norm without modification of the linguistic expression, thus facilitating a distinct form of ex post facto application through interpretation.

PRINCIPLES RESTRAINING CRIMINAL LAW

1. PRINCIPLE OF LEGALITY

1.5. *Lex praevia* (prohibition of harsher ex post facto laws/prohibición de las normas penales desfavorables)

Scope of application:

a) *Undisputed: offences, punishments, security measures.*

b) *Disputed: Procedural criminal laws, criminal enforcement regulations/normativa penitenciaria (but see [Judgment ECHR Del Río Prada vs. Spain, 21 October 2013 \(Grand Chamber\)](#), retroactive change through interpretation, i.e., case law (see also Del Río Prada).*

PRINCIPLES RESTRAINING CRIMINAL LAW

1. PRINCIPLE OF LEGALITY

1.6. *Lex stricta*. Principle of strict construction and prohibition of analogy

1.6.1. Boundaries to interpretation in criminal law.

- Criminal Law **only applies to the cases clearly stated in the norm extracted from the wording of a statute** and **prohibits legal analogy**, *i.e.*, the application of the criminal norm to cases not encompassed within its legal definition. Gaps in Criminal Law are not a flaw but a way to protect liberty.
- The use of analogy beyond the possible meaning of the text of a given legal provision means creation of law by the judiciary, since it represents an extension of the scope of punishability by interpretation and thus a violation of the principle of division of powers.
- This order is directed at interpreters of the Law (Judges and Courts of Law) and is also expressly stated in Art. 4.1 CrimC.
- E.g., [Judgment ConstCt 111/1993, of 25 March 1993](#), on the application of *intrusismo* (unqualified practice) beyond the meaning of the legal definition.
- Favourable analogy is permitted, e.g., Art. 21.7 CrimC (in this case it is authorised by Law) but so far no analogous justification or excuse has been recognised by case law.

PRINCIPLES RESTRAINING CRIMINAL LAW

1. PRINCIPLE OF LEGALITY

1.6. *Lex stricta*. Principle of strict construction and prohibition of analogy

1.6.2. Methods of interpretation usually applied in criminal law.

- Authentic interpretation is based on the will of the legislator and inferred from legislative preambles, statements of policy or purpose, and records of legislative procedure, etc.
- Historical interpretation is based on the historical development of legal concepts, e.g., Judgment ConstCt 111/1993, of 25 March 1993, on the application of the offence of unqualified practice (*intrusismo*) beyond the meaning of the legal definition, based on a historical interpretation of the notion of academic degree.
- Teleological interpretation attempts to understand the meaning of the Law according to its purpose. This sometimes involves going beyond what is literally stated in the various legal dispositions and is certainly a form of interpretation that is widely used in criminal law theory. Although on most occasions the method of criminal law theory defines the terms that do not have an express definition in the criminal statutes, the elaboration of these concepts is frequently teleological.

For example: **the construction of the concept of legally protected interest** and the corresponding establishment of the perimeters of wrongdoing are ubiquitous and clear examples of teleological interpretation.
- Systematic interpretation creates a body of coherent provisions within a statute or between different statutes, e.g., the construction of the need for an organic act to create criminal offences and punishments (Lesson 2, point 1.4) is a systematic interpretation.

PRINCIPLES RESTRAINING CRIMINAL LAW

1. PRINCIPLE OF LEGALITY

1.7. *Lex certa*. Maximum certainty principle (*Principio de taxatividad*)

- *This principle is directly related to the need for a legal definition in Criminal Law (Lesson 6).*
- *It is a mandate for optimisation as a consequence of the open texture of language resulting in vagueness and requires Criminal Law to be formulated in terms that are as clear as possible.*
- *It has been applied by the ConstCt on numerous occasions in cases of administrative offences but only a few times in cases of criminal offences:*
 - the interpretative judgment on the reiteration of misdemeanours (*faltas*), [Judgment ConstCt 3/2015](#);
 - the case of the National Board of Herri Batasuna, [Judgment ConstCt 136/1999](#) (vagueness in relation to the proportionality of punishment); and
 - [Judgment ConstCt 53/1994, 24 February 1994](#), which is the only case that has declared a criminal law “void due to vagueness”.

PRINCIPLES RESTRAINING CRIMINAL LAW

1. PRINCIPLE OF LEGALITY

1.8. *The problem of blank criminal laws (“Leyes penales en blanco”)*

- Blank Criminal Laws are legal provisions that do not contain all elements of the legal definition but instead refer to the legal dispositions of other legal branches.

Examples: Art. 305, 316, 318 bis, 325, 348.2, etc. CrimC

- Problems arise with:
 - *The requirement for Criminal Law to be formulated by statute (organic law), if the disposition completing the legal definition is not statutory (e.g., Regulations) and comes from a Spanish autonomous region (rather than the central authority with competence for criminal law).*
 - ***Certainty**, if the main elements of the offence are not in the legal definition or the result of the redirection is not straightforward or precise.*
 - ***Retroactivity**, if the elements of the legal definition do not change but the redirected legal dispositions do.*

PRINCIPLES RESTRAINING CRIMINAL LAW

1. PRINCIPLE OF LEGALITY

1.8. *The problem of blank criminal laws (“Leyes penales en blanco”)*

- According to several judgements of the ConstCt (judgments [127/1990](#), [118/1992](#), [111/1993](#), [24/1996](#), [120/1998](#), [101/2012](#)), for blank criminal laws to be valid they should have the following features:
 - The reference to the non-criminal legal disposition should be explicit and be justified by the nature of the legally protected interest.
 - The criminal statute should contain the penalty and the nuclear element of the conduct.
 - The reference should provide enough legal certainty so that the legal definition ensures that citizens have knowledge of the prohibited or required action.
 - The referred non-criminal disposition should not comply with the requirement of organic law but only with the requirement of being statute; it could even be complemented by regulations (*reglamentos*) if these develop the statute; as occurs in a decentralised State, the non-criminal disposition could be approved either by the central power or by the autonomous communities.

PRINCIPLES RESTRAINING CRIMINAL LAW

2. THE HARM PRINCIPLE APPLIED TO CRIMINAL LAW (OR LAW OF THE EXCLUSIVE PROTECTION OF LEGALLY PROTECTED INTERESTS).

- *The harm principle is a rule that requires that every criminal offence should protect a legally protected interest (see the notion of material wrongdoing in Lesson 7).*
- *Legally protected interests are needed to establish the scope of application of any legal definition since they define its material wrongdoing. It is not possible to create a legal definition without a legally protected interest behind it.*
- *Legally protected interests refer to values that may be material or immaterial. In some cases, these interests exist primarily to enhance the protection of other, more valuable legally protected interests. This is normally achieved through abstract endangerment offences (v.gr., safeguarding the integrity of legal transactions in forgery cases may serve to protect property, which is the legally protected interest at the core of the offence of fraud)*
- *Problems with the concept of legally protected interest:*
 - *Except for those with a material basis and those with a social consensus, legally protected interests could be open to discussion in societies with increasingly diverse values and different worldviews.*
 - *In some cases, the concept of a legally protected interest is just a matter of language, serving to justify a criminal offence that lacks justification simply because the offence already exists in law and is therefore binding.*

PRINCIPLES RESTRAINING CRIMINAL LAW

3. THE PRINCIPLE OF MINIMAL CRIMINALISATION (*Principio de intervención mínima*)

- *This is a mandate for optimisation directed at the legislator.*
- *It is related to the fragmentary nature of criminal law, which is also a component of the principle of proportionality applied to criminal law.*
- *Criminal law protects legal assets but at the cost of other fundamental rights. Freedom should be sacrificed, and criminal law applied, only when no other resource is available.*
- *It should be applied by the legislator (when criminal statutes are created) and also by the Courts (since interpretation is necessary to create norms).*
- *Criminal law should never be a complete legal system: its nature requires it to be incomplete and only applicable to the most serious attacks to relevant legally protected interests: an expansive wave of new criminal offences jeopardizes this basic idea.*

PRINCIPLES RESTRAINING CRIMINAL LAW

4. PRINCIPLE OF PROPORTIONALITY.

4.1. PROPORTIONALITY

- *Proportionality is recognised by the ConstCt as a component of the principle of legality when applied to criminal law.*

- *There are three aspects of proportionality in a broad sense:*

 - Adequacy:** the means should be adequate for achieving the goals to which criminal sanctions are directed, i.e., safeguarding the legally protected interests.*

 - Need for intervention:** criminal law should be applied only when its intervention is truly necessary, and only in the specific manner prescribed by law.*

 - Proportionality in a narrow sense** (the penalty is proportionate to the crime). In its Judgment 136/1999, the ConstCt suggested that the Legislature is the body that in principle is entitled to ponder the proportionality of criminal sanctions within the limits of the Constitution. The intervention of the ConstCt, or any other Court in the Criminal Justice system, is restricted to cases that could be considered unconstitutional. In all other cases, Courts should apply Art. 4.3 CrimC.*

PRINCIPLES RESTRAINING CRIMINAL LAW

5. NE BIS IN IDEM PRINCIPLE. DEVICES FOR AVOIDING BIS IN IDEM WITHOUT RES JUDICATA: THE CONCURRENCE OF NORMS.

5.1. Ne bis in idem (*the right not to be tried or punished more than once*)

According to this principle, no one shall be liable to be tried or punished again for an offence for which they have already been convicted or acquitted in accordance with the law.

- The Const. Court has stated that this principle stems from art. 25.1 of the Spanish Constitution (Decision 2/1981). The Constitutional Court (Decisions 177/1999; 2/2003) later ruled that the ne bis in idem principle is a guarantee that derives from the principles of legal certainty and proportionality.
- *This principle is also recognised in the Convention for the Protection of Human Rights and Fundamental Freedoms, in Article 54 of the Convention implementing the Schengen Agreement (1985), and in the Charter of Fundamental Rights of the European Union (2000).*
- This principle is not recognised as such in our Criminal Code but is the rationale behind art. 8 (concurrence of norms) and art. 67.

PRINCIPLES RESTRAINING CRIMINAL LAW

5. NE BIS IN IDEM PRINCIPLE. DEVICES FOR AVOIDING BIS IN IDEM WITHOUT RES JUDICATA: THE CONCURRENCE OF NORMS.

5.1. *Ne bis in idem* (the right not to be tried or punished more than once)

1. Identifying the facts underlying the breach.

Although it seems straightforward to determine whether something is the same fact or contains different facts, in reality it is not so straightforward. The same action (e.g., killing a king, homicide of a member of a royal family, killing a policeman, or a bombing that brings about multiple killings) could all be understood a single fact or as multiple facts since either a merely factual approach (based on the physical motion of the body) or a normative approach can be used to categorise an action.

2. Identifying the legal grounds for punishing the conduct (i.e., identifying the protected legal interest) and the non-existence of a special relationship of subjection to the Public Administration.

3. Identifying the offender. As we know, more than one offender can be punished for the same fact. This is what we call, in a generic way, participation because, in accordance with arts. 27, 28, 29 and 30 CrimC it is possible to punish not only the direct perpetrator of the fact but also those who participate in the fact, who are also considered perpetrators (abettors, necessary cooperators) and accomplices. **However, problems arise with identifying the offender when a person acts in the name of another (art. 31 CrimC).**

PRINCIPLES RESTRAINING CRIMINAL LAW

5. NE BIS IN IDEM PRINCIPLE. DEVICES FOR AVOIDING BIS IN IDEM WITHOUT RES JUDICATA: THE CONCURRENCE OF NORMS.

5.1. Ne bis in idem (*the right not to be tried or punished more than once*)

- This principle is traditionally understood to mean that no individual may be subjected to more than one sanction for the same act, if the requirements previously exposed are met (triple identity of facts, grounds for punishing and offender)
- The Const Court has given a restrictive interpretation of material bis in idem since ConstCt Judgment 2/2003, of 16 January. The ConstCt holds that this principle and the guarantees contained in Article 25.1 Const are not violated if the criminal court, acting after the administration, imposes a penalty on the same person for the same act and on the same grounds but deducts the amount of the fine already imposed by the administration from the fine.
- This technique does not solve all problems – e.g., it cannot solve problems when the sanctions have different natures and effects – and therefore it cannot be conceived as a rule but as a specific solution for cases in which bis in idem cannot be avoided in any other way (closing clause).

PRINCIPLES RESTRAINING CRIMINAL LAW

5. NE BIS IN IDEM PRINCIPLE. DEVICES FOR AVOIDING BIS IN IDEM WITHOUT RES JUDICATA: THE CONCURRENCE OF NORMS.

5.2. Concurrence of norms (Art. 8 CrimC).

- a) Speciality, 8. 1st: The special legal definition has to be applied in preference to the general legal definition, e.g., Murder (Art. 139 CrimC) has to be applied in preference to homicide (Art. 138 CrimC).
- b) Subsidiarity, 8.2nd: Subsidiary legal definitions should be applied only if the principal ones are not applied, either because they are so defined by law (e.g., Art. 172.1.II CrimC) or as a matter of fact
- c) Consumption, 8.3rd: This refers to cases in which certain conducts are needed for a crime to be committed (e.g., robbery vs. unlawful detention); acts committed after the offence and contemplated in the penalty of a more serious crime (e.g., illegal burial and homicide); and danger offences and result offences when the result has been brought about.
- d) Closing rule, 8.4th: The legal definition with the higher penalty applies if the previous criteria are not applicable.

PRINCIPLES RESTRAINING CRIMINAL LAW

6. PRINCIPLE OF CULPABILITY

- This principle is one of the basic pillars of Criminal Law based on the Rule of Law.
- The principle of culpability is not the Assessment of Culpability (Attribution/Blameworthiness) nor the declaration of guilt by the Courts but has connections with both.
- Culpability is the connection between the wrongdoing and the individual and reflects the need to impose a criminal sanction only on those who could be held fully responsible for a specific deed
- **Rationale:** The principle of self-actuation (also called the autonomy principle) is based on the basic liberal idea that an individual should only be punished if they possess the capacity to act freely; i.e., if they could have chosen to act differently. Self-actuation is thus a prerequisite for freedom and is linked to the inherent dignity of every human being (art. 10.1 Spanish Constitution and Protocol 13 ECHR).
- Requirements stemming from culpability:
 - A) *Individual responsibility for the deed.*
 - B) *Subjective connection between the perpetrator and the deed.*
 - C) *Determination and individualisation of punishment that connects the punishment with desert.*

PRINCIPLES RESTRAINING CRIMINAL LAW

6. PRINCIPLE OF CULPABILITY

A) Requirements of individual responsibility for the deed.

1. Punishment for external actions, not personality.

- This basic requirement is based on the fundamental principle of liberty that also comprises freedom of thought, conscience, religion and speech (art.16 and 20 Constitution; arts. 9 and 10 European Convention of Human Rights).
- We can only punish for external deeds that consist of wrongdoing, not for a certain way of life or a particular line of thinking. A criminal law against a deviant personality is therefore not allowed by our Constitution (Judgement of the ConstCt 150/1991, 4 July 1991) even though, if only in an implicit way, a person holds beliefs that are deviant or contrary to those held by the majority. Even when contrary to basic rights and liberties, the person cannot be punished unless they commit a deed that amounts to a criminal offence because the self-actuation principle in its expression of the free development of the personality is constitutionally protected (Art. 10.1 Const).

E.g., National socialist associations, racism, the publication of revisionist literature

2. *Culpability* involves being punished for a fact connected to one's behaviour. Prohibition of the vicarious liability of individuals.

- Culpability requires an individual connection with the commission of the deed and has been connected by the Constitutional Court to the principle of legality in art. 25.1 Constitution (Judgment ConstCt 131/1987, 20 July 1987) provided that only those responsible for an offence according to the law can be punished.
- An individual can only be held responsible for their own deed because if someone were to be punished for the deed of another, it could not be said that the individual could have acted otherwise. This principle attempts to avoid the transference of responsibility where the individual has no possibility of acting (e.g., historical examples of transference of responsibility are the penalties that were imposed on the heirs of people convicted during the middle ages).
- There are problems of culpability related to some criminal institutions which extend the criminal liability beyond effective participation of the active agent, e.g. illicit associations or associations of wrongdoers, criminal groups and organisations, Art. 130 CrimC for crimes committed through the press or dogmatic theories such as "dominion of the criminal deed" or the notion of collaborating with armed groups. In all these cases criminal liability could be extended beyond desert and actual participation.

PRINCIPLES RESTRAINING CRIMINAL LAW

6. PRINCIPLE OF CULPABILITY

B) Requirements of a subjective connection between the perpetrator and the deed.

1. Culpability and *mens rea*.

- *Mens rea* is the expression of the connection between the individual and their deed, and is at least partially enshrined in articles 5 and 10 SCS (Lessons 9 and 10).
- An individual can be held criminally liable only for criminal acts that are the result either of their knowledge and wilfulness (intention) or of an infringement of their duty of care (negligence).
- The subjective link required between the act and the perpetrator means banishing objective liability (a mere objective – causal – connection between the perpetrator and the act performed). Results that are merely the product of chance cannot be attributed to the subject involved in their production. There is no subjective link between the act and its perpetrator, to the extent that it cannot be said that the act is a manifestation of their personal autonomy.
- The exclusion of strict liability implies the exclusion of one of its historical manifestations, *versari in re illicita* ("*qui versari in re illicita respondit etiam pro casu*"): the person who carries out an initial unlawful conduct is liable for all the results produced that are causally linked to that initial unlawful conduct, regardless of whether they were not known and wanted or whether they could not have been foreseen or consequently avoided by the perpetrator.
- The exclusion of strict liability and the requirement of intention or negligence has been assumed by constitutional jurisprudence as a component of the principle of culpability (Judgments 76/1990 of 26 April; 246/1991, of 19 December; and 164/2005, of 20 June).

PRINCIPLES RESTRAINING CRIMINAL LAW

6. PRINCIPLE OF CULPABILITY

B) Requirements of a subjective connection between the perpetrator and the deed.

2. Accountability:

Holding a person responsible for their criminal acts and for understanding these as a manifestation of personal autonomy requires that the subject has the normal capacity both to know the legal meaning of their conduct and to govern it. This is considered concurrent if the subject has a certain degree of personal development and maturity (age of criminal majority) and certain psychic capacities – dispositions – to a normal degree (accountability). Maturity and the capacity to understand the unlawfulness of an act and to direct one's conduct in accordance with this understanding are necessary prerequisites for holding the subject responsible for their actions and are included in articles 19, 20.1, 2 & 3 CrimC.

3. Knowledge of wrongdoing:

To hold someone responsible for their acts, they must know the legal significance of their conduct. If they were unaware of the prohibited nature of their conduct, they had no reason to avoid it (invincible error of prohibition). For this reason, Article 14.3 CrimC provides for the exclusion of criminal liability in such cases.

4. Excuses:

A person acting in an exceptional situation is not required to bring their conduct into conformity with the law since, in such circumstances, it is either not possible for the subject to control their conduct or it is unreasonable to require them to do so. The law cannot demand heroic conduct from the ordinary citizen.

PRINCIPLES RESTRAINING CRIMINAL LAW

7. THE NEED FOR HUMANITARIAN PENALTIES AND THE CONSTITUTIONAL MANDATE OF REHABILITATION AND RESOCIALISATION.

- The demands of liberal thinkers, though not enshrined as such in our Constitution, led to the implementation by statute of some of their expressions, including the prohibition of the death penalty, torture, all inhuman or degrading punishments or treatment (Art. 15 EC), and the prohibition of forced labour.

7.1. Prohibition of punishments that are inhuman and degrading by their very nature.

7.1.1. The death penalty

- The death penalty is expressly prohibited by the SC in Art. 15 except in times of war. It was suppressed in our legal system by Organic Law 11/1995, of 27 November. Spain has also ratified Protocol 13 of the European Convention on Human Rights, which forbids the death penalty in all circumstances.
- It is the cruellest, most degrading and inhuman form of punishment because it entails the destruction of the individual's biological substratum, without which the rest of their attributes, dignity and fundamental rights do not exist.

PRINCIPLES RESTRAINING CRIMINAL LAW

7. THE NEED FOR HUMANITARIAN PENALTIES AND THE CONSTITUTIONAL MANDATE OF REHABILITATION AND RESOCIALISATION.

7.1.2. Physical punishment of all kinds and punishment aimed at modifying the personality.

- These include all punishments that involve physical harm to the individual, whether permanent in nature, such as mutilation (a punishment that is still in force in some countries) or corporal punishment (execution by stoning, stoning, branding with a hot iron, etc.).
- The inhuman and degrading nature of these punishments is not in doubt even when they are carried out in conditions that do not pose a risk to life (e.g., mutilation) because they involve limiting the individual's faculties for life and involve corporal interventions that are prohibited by the Constitution.
- The same can be said of actions involving manipulation of an individual's personality because they affect its free development. All treatments must be non-compulsory according to our penitentiary legislation but if benefits are attached to a treatment, it is not completely voluntary.

E.g., Art. 112.3 and 4 of Royal Decree 190/1996, of 9 February, which passed the Penitentiary Regulations.

PRINCIPLES RESTRAINING CRIMINAL LAW

7. THE NEED FOR HUMANITARIAN PENALTIES AND THE CONSTITUTIONAL MANDATE OF REHABILITATION AND RESOCIALISATION.

7.1.3. Prohibition of forced labour

- Art. 25.2 CE expressly prohibits forced labour such that prison labour must be remunerated and must be protected through contributions to Social Security. Individuals should not be treated as a means to an end (a basic requirement of human dignity). Based on the same principle, our legal system also prohibits forcing people to carry out personal services.
- These prohibitions are compatible with voluntary penitentiary work conducted as a component of rehabilitative treatment as well as the requirement to take care of one's own prison cell or to collaborate in common tasks (Judgement ConstCt 116/2002, of 20 May). A special relationship regarding the subjection of inmates justifies the carrying out of obligatory services of collaboration in common tasks. These services are expressly included in the Organic General Penitentiary Act (art. 29.2) and the Penitentiary Regulations. The ConstCt denies that these services can be assimilated to penitentiary work and even less to forced labour.

PRINCIPLES RESTRAINING CRIMINAL LAW

7. THE NEED FOR HUMANITARIAN PENALTIES AND THE CONSTITUTIONAL MANDATE OF REHABILITATION AND RESOCIALISATION.

7.1.4. Prohibition of degrading punishment.

- Degrading punishment is considered contrary to human dignity and as such is prohibited by art. 15 SC because it involves subjecting those convicted of crimes to public humiliation and mockery.

Degrading punishments occurred historically when, for example, stonings, hangings and other public executions were carried out in public. In addition to the punishment itself, these punishments were even more infamous because they were conducted in public.

In more recent times, e.g., in the 1973 revision of the 1944 Criminal Code, public reprimand could be found at art. 27, which was delivered by the Court in a Public Hearing. However, it exists in Juvenile Criminal Law, where it is framed as an educational tool (Art.7.1.m of the Organic Act on the Criminal Responsibility of Minors).

- No such punishments currently exist in our legal system, though certain regulations, such as the publication of citizens' debts to the Public Treasury, may have similar effects.

PRINCIPLES RESTRAINING CRIMINAL LAW

7. THE NEED FOR HUMANITARIAN PENALTIES AND THE CONSTITUTIONAL MANDATE OF REHABILITATION AND RESOCIALISATION.

7.2. Penalties that are inhuman and degrading due to their extension

7.2.1. Permanent, revisable imprisonment

- From a retributivist perspective, any sentence that exceeds what is deserved based on the offender's guilt is considered inhumane, as it treats the individual not as an end in themselves but as a means to serve other goals. However, since retribution is not the sole purpose of punishment, the mere fact that a sentence goes beyond strict desert does not automatically render it inhumane.
- Although prison sentences are an advance on punishments such as the death penalty and corporal punishment, the question that needs to be asked is whether a prison sentence that lasts too long is also an inhumane form of punishment since it carries with it damages to the mental and moral integrity of the inmate and a gradual deterioration of their personality. The limit at which this damage begins to appear is 15 years, though the severity and reversibility of the damage depends on what kind of penitentiary regime is applied (e.g., the possibility of furloughs, third degree (or open regime), parole, and access to visitations).
- Before permanent, revisable prison sentences, our Criminal Code already had long sentences (30 years) and highly restrictive completion regimes that in practice already included cases of permanent imprisonment, albeit with a component of certainty as to when the sentence would be completed. These were normally applicable when several crimes had been committed.

PRINCIPLES RESTRAINING CRIMINAL LAW

7. THE NEED FOR HUMANITARIAN PENALTIES AND THE CONSTITUTIONAL MANDATE OF REHABILITATION AND RESOCIALISATION.

7.2. Penalties that are inhuman and degrading due to their extension

7.2.1. Permanent, revisable prison sentences

- Permanent, revisable prison sentences have exacerbated this situation, because, in addition to having to serve at least 25 years in prison, open regimes and favourable evaluations (art. 92 CP) should have been granted. This implies that:
 1. Although the law provides for the possibility of release, it is always subject to strict conditions.
 2. Opportunities for reintegration and rehabilitation are affected because the prisoner's personality will deteriorate by the passing of time and because of opportunities for reintegration and rehabilitation through the prisoner's access to permits and open regimes will be limited (art. 36.1 Cp). The principal aim of the penalty is, therefore, incapacitation.
 3. There are no reliable criteria for determining when a prisoner's sentence can be reviewed.
 4. There is therefore no certainty of release, which means that a necessary requirement of permanent, revisable prison sentences is not fulfilled.
- ConstCt has declared permanent, revisable prison sentences to be compatible with SConst (ConstCt [Judgment 169/2021, 6 October 2021](#)), even though it explicitly recognised that its regulation is blatantly defective (9th legal ground, which establishes a constitutional interpretation of Art. 92. 3 & 4 CrimC) and that a special effort is required for it to comply with the constitutional requirement of resocialisation (10th legal ground).

PRINCIPLES RESTRAINING CRIMINAL LAW

7. THE NEED FOR HUMANITARIAN PENALTIES AND THE CONSTITUTIONAL MANDATE OF REHABILITATION AND RESOCIALISATION.

7.2. Penalties that are inhuman and degrading due to their extension

7.2.2. In cases of punishments of individuals with a short life expectancy (such as the imprisonment of individuals over 70 years of age or of those with a serious or incurable disease), to avoid situations of human indignity, Art. 91 CrimC establishes the possibility of parole.

7.3. Penalties that are inhuman and degrading due to their form of implementation

- A punishment can also be qualified as inhuman if its implementation adds a certain intensity of suffering, e.g., being held in solitary confinement (depending on its duration and intensity), being prohibited from interacting with other prisoners or family, having access withheld to information from outside prison via newspapers and TV, etc., or being held in appalling conditions such as overcrowding, poor light, and lack of access to fresh air, hygiene, sanitation, mobility, or food.
- Living conditions in prison can also be inhumane if they are inadequate for prisoners with certain physical conditions, such as quadriplegia (ECHR, 2 December 2004, Farbuths v. Latvia; 10 June 2008, Scoppola v. Italy), or who are in need of medical treatments to which they do not have access in prison (ECHR, 14 November 2002, Mouisel v. France) in order to lead a dignified life.

PRINCIPLES RESTRAINING CRIMINAL LAW

7. THE NEED FOR HUMANITARIAN PENALTIES AND THE CONSTITUTIONAL MANDATE OF REHABILITATION AND RESOCIALISATION.

7.4. Constitutional approach to re-education and social reintegration (Art. 25.2 SC)

- As we saw when discussing the purposes of punishment, the constitutional approach does not imply that rehabilitation is the sole or primary purpose of a sentence.
- The approach applies to penalties and security measures exclusively, particularly those involving deprivation of liberty.
- Re-education and social reintegration is not a subjective right (ConstCt Judgment 2/1987, 21 January 1987) but a mandate for the legislator. They are also not the only goals in juvenile criminal law (ConstCt Judgment 160/2012 states that the supposedly re-educational measures of juvenile criminal law also have general preventive purposes, though a dissenting vote was cast by Adela Asua).
- The re-socialising function of punishment is a condition for the humanity of penalties (ECHR Decision James, Wells, and Lee v. UK, 18 September 2012).

PRINCIPLES RESTRAINING CRIMINAL LAW

8. OTHER RELEVANT CONSTITUTIONAL PRINCIPLES: CONSEQUENCES OF THE PRESUMPTION OF INNOCENCE ON SUBSTANTIVE CRIMINAL LAW.

- *Criminal Law could violate the fundamental right to the presumption of innocence (Art. 24.2 SC) if the legal definition establishes a presumption of guilt.*
- *ConstCt Judgment 109/1986, of 24 September, recognises that the right to be presumed innocent is a subjective public right with an "obvious projection as a limit to legislative power and as a conditioning criterion for the interpretations of the rules in force". In this line, the Court has included in the constitutional configuration of this right the interdiction of presumptions of the constituent elements of the crime.*
- *Regardless of the type of crime in question, it is not tolerable for any of the typical elements to be presumed against the accused, either with a rebuttable presumption, which implies a shift or reversal of the burden of proof irreconcilable with art. 24. 2 SConst (Judgment 105/1988, of 8 June), or with a presumption iuris et de iure, violating the presumption of innocence by relieving the prosecutors of the burden of proof and preventing those who defend themselves from proving the opposite thesis.*
- *This has been argued in relation to certain legal definitions, e.g., Art. 166 CrimC, on enforced disappearance, as it could be understood as a presumption of homicide or murder (the same penalties apply) and in certain other cases (e.g., repeated theft, ConstCt Judgment 185/2014, 6 November 2014).*

PRINCIPLES RESTRAINING CRIMINAL LAW

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