THE HISTORY OF PENAL LAW

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INTRODUCTION

A complete study of penal law cannot be made without passing through some of its historic points, because, while it is certain that history in this discipline may not have as much value as in the other branches of the law, its influence cannot be underestimated. In the first place, historic knowledge broadens the stage of our culture and makes it possible for us to speak of the law in remote ages; in the second place, the historical antecedents of the penal figures help in obtaining a more consummate outline thereof; and finally, in general, the data of experience is always relevant in all the aspects of the law.[1]

Kirchwey holds, on the ground that all law is a growth, "a matter of accretion and development out of custom and habit, that no scientific study of the law of today can be justified, nor can modern law be accounted for without harking back over the trail of history to its beginnings."[2]

A. Historical Approach

There are, among other approaches, two perspectives for viewing the history of penal law: evolutionary and revolutionary. The first regards the development of penal law as occurring in gradual increments, which assumes continuity and human psychic unity; the second, in radical transformations implying discontinuities and new world views discarding old

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1 1 FEDERICO PUIG PENA, DERECHO PENAL 38 (1950).

2 George W. Kirchwey, *Criminal Law*, in 4 THE ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 569-578 [hereinafter referred to as ENCYCLOPAEDIA].

ones.[3] The evolutionary perspective, with some of its limitations indicated below, is pursued in this article.

Following the evolutionary perspective, periods and stages were constructed by writers like Kohler[4] and Post[5] with reference to legal forms and concepts. In dealing with this topic in periods and stages, the evolutionist assumes a general psychic unity of mankind. The human psyche, reacting to physical environments similar in general features, expresses itself in a cultural development which is uniform, gradual and, in the opinion of most evolutionists, progressive. It is *uniform*, in the sense that culture everywhere evolves in essentially similar ways and passes through analogous or identical stages — the so-called "parallelism" in development. It is gradual, in the sense that cultural changes in time are slight and cumulative, moving in imperceptible gradations. It is progressive, in the sense that such changes lead to higher forms.[6]

The methodology adopted by evolutionists is the comparative analysis and, associated with it, is the concept of survival. The evolutionists

3 The revolutionary perspective, proposed by Karl Marx who absorbed Hegel's dialectic trilogy in his youth, meant to supplement the evolutionary concept of gradual change with the concept of cataclysmic or revolutionary change, an ideological reconstruction which Peter Kropotkin later transformed into "evolution by revolution", which has so far been recognized as possessing practical consequences of vast significance [Alexander Goldenweiser, *Social Evolution*, in 4 ENCYCLOPAEDIA 565-662].

4 Joseph Kohler (1849-1919), German jurist; acknowledged leader of neo-Hegelian school, but retained only the evolutionary and pantheistic tendencies of Hegelianism and discarded almost completely the Hegelian dialectic; towards juristic problems, his position was eclectic and opposed to the fundamental theory of the sociological school in criminal law, although he accepted nevertheless a great part of its program of prevention; his reputation ultimately rested upon his achievements as legal historian and ethnologist, although as legal historian he was dominated by the concept of unilinear evolution and his work often suffers from great reliance on intuition; and was accused by Dahm as having treated six centuries of development in medieval Italian statutes as a static period of almost changeless culture [William Seagle, *Joseph Kohler*, in 8 ENCYCLOPAEDIA 587-588].

5 Albert Hermann Post (1839-95), German jurist; wrote on primitive forms of law and society, and developed a system of ethnological jurisprudence; upon methodological assumptions of positivism, aimed to construct in a purely empirical manner a universal theory of law; postulating a universally similar and, at the same time, necessary course of evolution, proposed a "comparative ethnological method" characterized by neglect of varying factors and predilection for typical cultural phenomena; posited series of stages of societal evolution; although remaining the most important representative of ethnological jurisprudence, his system collapsed with the recognition that divergent evolution of various peoples is possible and demonstrable; his attempt to create a system of primitive law and universal legal history now considered by some to be obsolete; said to have relied upon unhistorical methods and ended doing violence to facts, forcing himself into an *a priori* scheme possible only through psychological construction, with materials, both insufficient and not always exact [Herman Trimborn, *Albert Herman Post* in 12 ENCYCLOPAEDIA 267].

6 Goldenweiser, *supra* note 3 at 659.

believe that, as culture changes, separate cultural elements are not always wholly obliterated but some survive in a transformed or attenuated form. Survivals were utilized by evolutionists as proof of their contentions about stages in culture.[7]

But the concepts of uniformity and of stages of development have already collapsed with the accumulation of adequate anthropological material. Regression has been proved to be as common in history as progress; and culture, moreover, seldom advanced in unison as to its parts. The notion of progress, furthermore, implies judgment as to what constitutes improvements and no such judgments could be made without standards. But, standards could be notoriously subjective. Progress, therefore, may not be a matter of fact but of opinion.[8]

The idea of evolution of penal law, as all evolutionary perspectives, nevertheless brings animation and imagination to the field of development of penal legal thought. This philosophy of penal law history stands for broad perspectives, logical coherence and finality.[9]

It has been employed by Cuello Calon and Puig Pena in their treatment of the evolution of penal law and of penal ideas.[10] As previously indicated, this methodology relies on the analysis of survivals and the comparative approach. With this methodology, three cautionary notes are apropos.

Regarding the first, as previously intimated, Cuello Calon states that new periods of penal law history do not necessarily obliterate or completely supplant previous ones, but traces of the latter survive (*superviviencias*). Like animals constantly remaining in unchanging environments that do not change at all, people living separately from other people in inaccessible places or in islands are able to preserve more easily their language and the customs of other times. Such people do not change for some reason. On the other hand, some people, although living in the middle of cultured peoples, preserve the customs and institutions of other

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] 1 EUGENIO CUELLO CALON, DERECHO PENAL, 56-77 (1951); PUIG PENA, *supra* note 1 at 38-54.

times.[11] Survival opens a window to the past and allows us to see that which we would otherwise have been ignorant about at present.[12] But, with this methodology, not all past events are history; only those that carry forward into the future.

Second, not all past events are part of written history; and not all written history is actual history.[13] The history of written criminal legislation which, traditionally, constitutes the fundamental basis for the study of the evolution of penal law, is not always a reliable ground for its recognition because many penal laws and dispositions emanating from the real authority or other powers of the state have become dead letters, constituting nothing more than an erudite collection for the knowledge of the studious which have never gained the status of applied and living law. This happened, according to the example given by Cuello Calon, in Spain with the *Partidas* and in Germany with the *Especulo de Sajon* (*Sachsenspiegel*). In many cases, the penal law which applied during the ancient times were customary laws (*derecho consuetudinario*) or those established by the judgment of the tribunals (*jurisprudencia*). Unfortunately, many of those customs and a greater part of said jurisprudence have disappeared without leaving any trace.[14] So, before commencing the study of the criminal legislation of diverse peoples, it is necessary to make this reservation, which

[11] CUELLO CALON, *supra* note 10 at 56, directs attention to the articles of the repealed Penal Code of 1870 (source of *Codigo Penal de Filipinas* and of our Revised Penal Code), inspired by the purest *talion*, for example: arts. 205, 361, without counting others that are profoundly influenced by this spirit. In the existing legislation at the end of the past century in Montenegro (he suggests reading Alimena, *La Legislazione penale del Montenegro*, Rome, 1896), there are some sort of *talion* and *composicion*, and in the Turkish Code (art. 172), repealed in 1926, there subsisted payment of the price of blood.

[12] *Id., citing* ALIMENA, PRINCIPIOS I at 105.

[13] Not to say, especially as regards the remote past in respect of which data has been scarce and, of course, incomplete, the so-called history has always been tentative, constantly subject to revisions or reconstruction on discovery of new or additional materials.

[14] CUELLO CALON, *supra* note 10 at 66. A similar observation has been made of Israeli or Jewish legislation such that in any discussion of the Hebrew law of the Biblical period the codified law must be differentiated from the popular or customary law as revealed in the narrative portions of the Bible. "The legal ideas and practices revealed in the Biblical stories conformed to the living conditions and environment of the Hebrews of that period. On the other hand, many provisions of the codified law were the expression of religio-ethical standards far in advance of their time and as a result they did not permeate the life of the people until much later. For example, the law requiring the liberation of Jewish slaves after six years of service was not actually observed at the end of the first temple, while the observance of the law regarding the annulment of all debts during the sabattical year (*shemitah*) met with difficulties even at the time of the second temple. These discrepancies between the religio-ethical principles which formed the motives for these laws and actual legal practice are reflected in the jeremiads of the prophets, who attacked such violations" [Asher Gulak, *Jewish Law*, in 9 ENCYCLOPAEDIA 219-225].

applies to the remote ages, that the legislated law could not always be taken as a faithful expression of that which has been effective during those times.[15]

Finally, when speaking of criminal legislation of the antiquity, one should not think of them as a systematic collection of penal precepts analogous to the modern codes. The codes, in the modern sense, were unknown during the period of antiquity. Those collections of laws of the past were composed, at times without order nor method of some sort, of precepts of most diverse conditions: of civil, political, religious, or others, of penal or administrative character. So, it is not possible to speak of penal codes, strictly, until a time close to the contemporary.[16]

B. Evolutionary Perspective: Historical States or Ages

The history of penal law is susceptible of division into specific and proper phases. The simple and convenient approach has been to adapt its study to the classical epochs of history, in general: (1) the *antiquity*, (2) the *middle*, (3) the *modern* and (4) the *contemporary ages*. Across these stages, the repressive function of penal law has undergone transformations and assumed diverse foundations at distinct times. Historians of this science have affirmed that, up to the present, four periods of such transformations could be indicated: that of private vengeance (*venganza privada*), that of divine vengeance (*venganza divina*), that of public vengeance (*venganza publica*), and the humanitarian period (*periodo humanitario*). In each of these era predominantly appeared the principles that gave them their names.[17]

It should not be thought, however, as previously indicated with reference to the evolutionary methodology, that the animating principle of a period is first completely exhausted before a new principle comes along to exclusively inspire the penal justice of the succeeding period, because the periods did not follow methodically and substitute one another completely; nor could one consider a preceding period as having been extinguished fully when the next period appeared. On the contrary, in each one of

[15] CUELLO CALON, *supra* note 10 at 66.

[16] *Id.*

[17] *Id.*

them, there only culminated a predominant penal idea, which coexisted with others different from it, even to the extent of being contrary to it.[18]

I. ANTIQUITY

Treatment of the antiquity is susceptible of further division into primitive law and ancient law. And, as regards the ancient times, a distinction is made between the Oriental and Occidental worlds, to underscore the mode of transition between one and the other with the coming of the Greek law.

The antiquity is described as the age of the birth and determination of the penal law. It is also the epoch when the principle of private vengeance predominated.

A. Primitive Law

The more remote epoch of primitive law is characterized by the system of pure vengeance.

On pure logical deduction, Pacheco asserts that the very first of human laws must have been penal law,[19] as manifested, of course, in customs of preliterate societies.

At the first moments of human history, when people have not yet reached the level of being organized as a community[20], much less as a

[18] Cuello Calon maintains that, it is certain, this is true not only of the past, but also of contemporary Spanish legislations, because there are numerous precepts in the Spanish penal codes inspired by penal ideas which, many centuries ago, were the principal foundations of the right to punish [*Id.*].

[19] PACHECO, EL CODIGO PENAL, INTRODUCCION 7.

[20] Kirchwey asserts that no human *community* has yet been found which lacks precepts and practices employed to protect itself by the use of force against acts which impair or endanger its internal peace and security (criminal law from the social science perspective). The necessity for such precepts and practices, therefore, seems to arise as soon as men were bonded together into a community [Kirchwey, *supra* note 2 at. 569].

state, one could neither speak of penalties nor of penal justice. Nothing has been observed which in any way could be regarded as equivalent to a penalty except vengeance (*la venganza*).[21]

Also, based on speculation, Alimena[22] maintained that, as the protoplasm instinctively reacts when irritated and all offended animals tend instinctively to react, one is compelled to think that the primal form and the original justification for that function — which we call penal justice — has come about by plain necessity of the instinct of vengeance. But, as Cuello Calon says, this vengeance is not a penalty, such that society has remained indifferent and a stranger to it.[23] It was in individual form and, as such, was practiced by the individual against another individual, or was carried out by a family group against another. It could not be considered a penal reaction.[24] Only when society is placed on the part of one

[21] This has been the speculation. As Kirchwey notes, the "cave man — if he was, indeed, the ancestor of modern man — left no legal records on the walls of his cave". Hence, the beginnings of modern European and American law in what is known as "primitive law" are "undiscoverable". On this score, Kirchwey adds:

> Even Maine's *Ancient Law* goes back no further than that which he calls the `era of codes,' of which the Twelve Tables of Rome were the outstanding example. Even Maine's reference to the trial scene described by Homer as pictured in the shield of Achilles remains far short of primitive law. The same picture, under the name of the `blood feud,' is found in medieval codes. It is possible that certain obscure Sanskrit texts may yet be translated and throw light on the problem but in the meantime, although direct evidence is lacking, there are certain clues as to the origins of the law. These are found in comparatively recent, first hand studies of contemporaneous primitives, such as certain Eskimo tribes, the Indians of North America, the inhabitants of Samoa and of other Pacific islands and some African tribes. If it may not be assumed that these people are, in their mental and social characteristics, much like the primitive ancestors of modern man, there are in fact to be found in their present social attitudes and practices many of the reactions and procedures which found expression in the codes from which modern criminal law derives [*Id.*].

[22] *Cited in* PUIG PENA, *supra* note 1 at 39; CUELLO CALON, *supra* note 10 at 57.

[23] Kirchwey maintains that it is not to be assumed that the community, however primitive, was indifferent to the common weal. "Public or sacral offenses are so dangerous that collective action has to be taken against them. This has been noted elsewhere in the group punishment of certain offenses, such as the violation of the sacred tabu, which was essential to the integrity of the community as a whole or protected it from the vengeance of the deity. So parricide or matricide, or an attempt at the usurpation of authority over the tribe or any one of the variety of offenses recognized as atrocious sins against the deity was summarily punished, almost invariably by death. These may well have been extremely rare in primitive society but with the development of the larger, less integrated community they became frequent enough to call for more drastic repression. It was doubtless that the predominantly religious character of the Israelitish and Babylonian codes caused the prescription of the death penalty for a variety of offenses denounced by the tribal deity which, in the western world, were more leniently dealt with" [Kirchwey, *supra* note 2 at 571].

[24] CUELLO CALON, *supra* note 1 at 57.

that exacts vengeance and the legitimacy of vengeance is recognized and given assistance when necessary, may one speak of a private vengeance equivalent to the penalty.[25]

From another perspective, it may be said that so long as acts of redress or vengeance, although regarded as rightful, may lead to further retaliation, the sanction behind rules of custom remains purely moral; but when the community begins to protect the persons who, in its opinion, have obtained due redress or taken rightful vengeance, these persons become in reality agents of the community, and the sanction behind the rules which they enforce may fairly be called legal.[26] But, for society to assume that paramount role, it must have first acquired sufficient vigor to enforce its will over its members.[27]

B. Ancient Law

The primitive system of vengeance has produced extraordinary evils. The private blood feud (*sangrienas guerras privadas*), for instance, has caused the extermination of many families. One who took vengeance did not recognize any principle of limitation in the exercise of the right and caused the offender and his family all possible evils. In order to avoid the pernicious consequences of unlimited reaction or ceaseless retaliation, the original barbaric system of vengeance was gradually palliated with the institution of the famous *talion* (punishment in kind; exaction of compensation in kind), "*similitudo suplicii*," or *lex talionis*, under which a torment greater

[25] It is said that when primitive men became organized into groups, retribution tended towards becoming the concern of the group. Contemplating diverse groups of primitives, with their wide diversity in social organization, Kirchwey observes that a similar method of dealing with an offending member tends to emerge. "Custom, which established the rules of conduct in the group, was rarely violated and, when violated, may in extreme cases be executed by self-exile or the suicide of the offender, although more frequently he is subjected to public humiliation." Among other tribes, it has been observed that the "offender, if recalcitrant, may be brought before the headman or council of elders — not for trial in the modern sense, but for judgment" because his guilt is either known or assumed. The measure of punishment was the only question; this is usually fixed by custom but may be modified by bargain, except when the injured party or his group insists on "full payment". The latter case, maintains Kirchwey, leads to the threshold of the blood feud, which plays a major part in medieval law [Kirchwey, *supra* note 2 at 570].

[26] Self-help (*autoayuda*), thus ordered, meets the needs of early society in all cases in which the right to be enforced is clear, and its violation apparent, but it does not furnish a definite or certain mode of settling controversies. This lack is filled by oaths, ordeals, arbitrations, and at last by authoritative judgments [*Id.*].

[27] Kirchwey disputes that the community, however primitive, was ever indifferent to the common weal [*Id.*].

than that which was caused to the victim cannot be returned to the criminal.[28] The formula of "an eye for an eye and a tooth for a tooth" presided over the vindictive process.

Subsequently, however, the system was further mitigated by the recognition of settlement (*composicion*), by virtue of which the offended party and his families avoid the right of vengeance by means of compensation or the payment of a certain amount of money.[29] This constitutes, as Ferri[30] says, the initial progress in the punitive area.

Kirchwey, however, asserts that traits of self-help (*autoayuda*) survived long after orderly retaliation has become established, as exemplified by the hue and cry of the Germanic law, or in the throwing of offenders in the Tarpeian rock in the ancient Rome. The greater license in dealing with an

[28] PUIG PENA, *supra* note 1 at 39. "It marked a great mitigation in sentiment when, as in the Mosaic law, cities of refuge were provided to which an offender who has killed someone inadvertently or otherwise without malice might flee and escape the avenger of blood. Primitive societies had no penalties but death or exclusion from the community and the latter, as Cain reminded the Almighty, was the equivalent of death. The principle of exact retribution — an eye for an eye, a limb for a limb, a life for a life — which is found in some of the ancient codes, was an obvious mitigation of the earlier uniform rule of death for all offenses of a serious character and marks a distinct stage in the long period of supplanting private vengeance by public law" [Kirchwey, *supra* note 2 at 571].

[29] "The identification of the individual with his group is so close that a crime, for example a killing, committed by a member of one group (which may be a tribe or a village community of considerable size, all the members of which are bound by ties of blood) on a member of another group, becomes a group offense and any member of the injured group may, unless due compensation is made, retaliate on the offender's group by killing any member of it. The compensation to be paid is determined by the social importance of the victim of the crime. For a crime committed within the group, the death penalty is rare and is inflicted only for the violation of a tabu, as incest. But there is no 'strict law' in the modern sense of the term. Nearly every liability, even for the violation of a tabu, if not too aggravated, may be compromised or waived" [*Id.* at 570].

[30] Italian criminologist (1856-1929) who, together with Cesare Lombroso and Rafael Garofalo, originated the positivist school of criminology, which has caused penal law to recognize the results of biological and social sciences and has affirmed the necessity of first studying the criminal and the medium in which he commits the crime and, only afterwards, studying juridically the crime committed; after his conversion to socialism, he ascribed to economic factors directly, or indirectly through heredity, a decisive role in the genesis of crime; he also called attention to the necessity of supplementing the Darwinian point of view, by which Lombroso and Garofalo justified the death penalty, by the Lamarckian, which emphasized the possibility of readaptation to the environment and favored the application of correctives to the delinquent; he propounded the doctrine of penal substitutes, according to which the legislator should supplement the repression of crimes with attempts at their prevention [G. Bernaldo de Quiros, *Enrico Ferri*, in 6 ENCYCLOPAEDIA 188].

offender caught in fresh pursuit is readily understandable on the basis of private vengeance, as it was less likely to be restrained in such a case.[31]

A curious exception to the evolutionary pattern of the system of private vengeance to the divine vengeance is that obtaining under the legal system revealed by the cuneiform laws.[32] The penal progress obtaining this early among the cuneiform laws, singular and forerunning in its temporal context, deserves a brief digression before an examination is made of the general pattern of development characterizing the ancient penal law of the rest of the Oriental world.

1. CUNEIFORM PENAL LAW

Present day knowledge of criminal law is derived largely from the criminal provisions, which are by no means inclusive. The cunieform scripts show that criminal law was an affair of the state, as there is no vestige of private vengeance, except in cases of adultery, nor was the religious principle dominant enough to be considered significant in its characterization.[33] But it was largely a private criminal law in that punishment was

[31] "The right of self-help was seen as indirectly operative in the increase of the fine allowed at a later stage in the case of a thief caught in the act. Thus, in the Roman law, the penalty in case of *furtum manifestum* was doubled (earlier, the Twelve Tables had provided that a thief caught in the act may be slain but the law has been changed by praetorian edict). This was not at all because detection in the act was an aggravation of the offense; the increased penalty was intended to induce the injured party to refrain from taking the law into his own hands" [Kirchwey, *supra* note 2 at 571].

[32] "By cuneiform law is meant all laws which make use of the cuneiform script for their written inscription, whose geographical scope, according to recent status of excavation, includes not only the original lands of the Babylonian civilization—Babylonia and Assyria—but extends in the East as far as the mountainous Elam region, reaching southward to the Sagros Mountains, while extending towards the west through Mesopotamia and Asia Minor to Syria and the Coast of the Mediterranean (chronologically began as early as 3000 B.C., down to second and first centuries B.C.). Obviously, there could not have been a uniform legal system covering that vast area and enduring throughout this long period." Historians consider the cuneiform script as serving the external criterion of the cultural influence of the Babylonian civilization as well as of a certain historical unity as is offered, by analogy, by the Chinese script. Paul Koschaker admits that a comprehensive outline of cuneiform law is possible solely as a comprehensive description of various legal institutions, to the extent that their juridic structure and their economic and social functions have been discovered. Such work unfortunately has been done only to a slight degree and least of all for the neo-Babylonian legal documents, which have been known longest of all. Hence, any outline thereof must necessarily be incomplete [Paul Koschaker, *Cuneiform Laws*, in 9 ENCYCLOPAEDIA 211].

[33] Although Hammurabi claimed divine inspiration by declaring in the preface to his code that the god Marduk directed him to deliver the principles of justice to the people (A. Arthur Schiller, *Lawgivers*, in 9 ENCYCLOPAEDIA 275-277); but *see supra* note 23, containing a passage where Kirchwey observes "the predominantly religious character of the x x x Babylonian Codes." [Kirchwey, *supra* note 2 at 571]; Cuello Calon, however, disagrees [CUELLO CALON, *supra* note 10 at 67].

meted out on behalf of the party wronged and not of the state. This was true of fines as well as of corporal punishment, since the latter could be remitted contractually through the payment of a sum of money. In several cases in the Middle Assyrian code of law, this was expressly stated and it may have been true to a wider extent.[34]

The concept of criminal guilt is outlined. The Code of Hammurabi and the Hittite law emphasized the deliberate deed in certain cases and punished it more severely. But, there existed a concept of guilt over and above such individual cases, although it was thought of objectively.[35] Indications to the effect that the concept of guilt had already begun to be based upon the subjective attitude of the doer, upon his actual knowledge or lack of knowledge of the crime may be found in the Code of Hammurabi and particularly in the Middle Assyrian code.[36]

On the other hand, there was no differentiation as to criminal responsibility, as indicated most clearly in the Hittite code, although penalties were graduated according to whether the injured party was a freeman or a slave or according to the rank of the culprit.[37]

The *lex talionis* was the dominating feature in the penalties of the Code of Hammurabi, together with frequent death penalty and the fine. Corporal punishment as a specific penalty was of slight importance. The Hittite code is similar but does not contain the *talio* as the measure of punishment. On the other hand, in the Assyrian penal law, corporal punishment (mutilation) and whipping play an important part, and in civil law the "bloody penalty" for breach of contract predominates.[38]

[34] In addition, there were the public offenses, which were prosecuted by the state; but its delimitions require further investigation [*Id.* at 214].

[35] For instance, it was held that the receiver of stolen goods was not a person who knowingly bought stolen property but a person who contracted a purchase secretly, without witnesses [*Id.*].

[36] *Id.*

[37] Koschaker explains that "the attitude corresponds to the relatively free position of the slave throughout the Near East; slaves were allowed to marry and to own a limited amount of property. Such leniency was probably due to the small number of private slaves, for the slave problem scarcely existed at all" [*Id.* at 215].

[38] "This and the outspoken description of sexual offenses, for which the refined Code of Hammurabi uses veiled terminology, are characteristic of the Assyrians as the somewhat complacent admonitions of the Hittite lawgivers for leniency and forbearance are characteristic of the latter" [*Id.*].

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The history of penal law is susceptible of division into specific and proper phases. The simple and convenient approach has been to adapt its study to the classical epochs of history, in general: (1) the *antiquity*, (2) the *middle*, (3) the *modern* and (4) the *contemporary ages*. Across these stages, the repressive function of penal law has undergone transformations and assumed diverse foundations at distinct times. Historians of this science have affirmed that, up to the present, four periods of such transformations could be indicated: that of private vengeance (*venganza privada*), that of divine vengeance (*venganza divina*), that of public vengeance (*venganza publica*), and the humanitarian period (*periodo humanitario*). In each of these era predominantly appeared the principles that gave them their names.[17]

It should not be thought, however, as previously indicated with reference to the evolutionary methodology, that the animating principle of a period is first completely exhausted before a new principle comes along to exclusively inspire the penal justice of the succeeding period, because the periods did not follow methodically and substitute one another completely; nor could one consider a preceding period as having been extinguished fully when the next period appeared. On the contrary, in each one of

[15] CUELLO CALON, *supra* note 10 at 66.

[16] *Id.*

[17] *Id.*

them, there only culminated a predominant penal idea, which coexisted with others different from it, even to the extent of being contrary to it.[18]

I. ANTIQUITY

Treatment of the antiquity is susceptible of further division into primitive law and ancient law. And, as regards the ancient times, a distinction is made between the Oriental and Occidental worlds, to underscore the mode of transition between one and the other with the coming of the Greek law.

The antiquity is described as the age of the birth and determination of the penal law. It is also the epoch when the principle of private vengeance predominated.

A. Primitive Law

The more remote epoch of primitive law is characterized by the system of pure vengeance.

On pure logical deduction, Pacheco asserts that the very first of human laws must have been penal law,[19] as manifested, of course, in customs of preliterate societies.

At the first moments of human history, when people have not yet reached the level of being organized as a community[20], much less as a

[18] Cuello Calon maintains that, it is certain, this is true not only of the past, but also of contemporary Spanish legislations, because there are numerous precepts in the Spanish penal codes inspired by penal ideas which, many centuries ago, were the principal foundations of the right to punish [*Id.*].

[19] PACHECO, EL CODIGO PENAL, INTRODUCCION 7.

[20] Kirchwey asserts that no human *community* has yet been found which lacks precepts and practices employed to protect itself by the use of force against acts which impair or endanger its internal peace and security (criminal law from the social science perspective). The necessity for such precepts and practices, therefore, seems to arise as soon as men were bonded together into a community [Kirchwey, *supra* note 2 at. 569].

state, one could neither speak of penalties nor of penal justice. Nothing has been observed which in any way could be regarded as equivalent to a penalty except vengeance (*la venganza*).[21]

Also, based on speculation, Alimena[22] maintained that, as the protoplasm instinctively reacts when irritated and all offended animals tend instinctively to react, one is compelled to think that the primal form and the original justification for that function — which we call penal justice — has come about by plain necessity of the instinct of vengeance. But, as Cuello Calon says, this vengeance is not a penalty, such that society has remained indifferent and a stranger to it.[23] It was in individual form and, as such, was practiced by the individual against another individual, or was carried out by a family group against another. It could not be considered a penal reaction.[24] Only when society is placed on the part of one

[21] This has been the speculation. As Kirchwey notes, the "cave man — if he was, indeed, the ancestor of modern man — left no legal records on the walls of his cave". Hence, the beginnings of modern European and American law in what is known as "primitive law" are "undiscoverable". On this score, Kirchwey adds:

> Even Maine's *Ancient Law* goes back no further than that which he calls the `era of codes,' of which the Twelve Tables of Rome were the outstanding example. Even Maine's reference to the trial scene described by Homer as pictured in the shield of Achilles remains far short of primitive law. The same picture, under the name of the `blood feud,' is found in medieval codes. It is possible that certain obscure Sanskrit texts may yet be translated and throw light on the problem but in the meantime, although direct evidence is lacking, there are certain clues as to the origins of the law. These are found in comparatively recent, first hand studies of contemporaneous primitives, such as certain Eskimo tribes, the Indians of North America, the inhabitants of Samoa and of other Pacific islands and some African tribes. If it may not be assumed that these people are, in their mental and social characteristics, much like the primitive ancestors of modern man, there are in fact to be found in their present social attitudes and practices many of the reactions and procedures which found expression in the codes from which modern criminal law derives [*Id.*].

[22] *Cited in* PUIG PENA, *supra* note 1 at 39; CUELLO CALON, *supra* note 10 at 57.

[23] Kirchwey maintains that it is not to be assumed that the community, however primitive, was indifferent to the common weal. "Public or sacral offenses are so dangerous that collective action has to be taken against them. This has been noted elsewhere in the group punishment of certain offenses, such as the violation of the sacred tabu, which was essential to the integrity of the community as a whole or protected it from the vengeance of the deity. So parricide or matricide, or an attempt at the usurpation of authority over the tribe or any one of the variety of offenses recognized as atrocious sins against the deity was summarily punished, almost invariably by death. These may well have been extremely rare in primitive society but with the development of the larger, less integrated community they became frequent enough to call for more drastic repression. It was doubtless that the predominantly religious character of the Israelitish and Babylonian codes caused the prescription of the death penalty for a variety of offenses denounced by the tribal deity which, in the western world, were more leniently dealt with" [Kirchwey, *supra* note 2 at 571].

[24] CUELLO CALON, *supra* note 1 at 57.

that exacts vengeance and the legitimacy of vengeance is recognized and given assistance when necessary, may one speak of a private vengeance equivalent to the penalty.[25]

From another perspective, it may be said that so long as acts of redress or vengeance, although regarded as rightful, may lead to further retaliation, the sanction behind rules of custom remains purely moral; but when the community begins to protect the persons who, in its opinion, have obtained due redress or taken rightful vengeance, these persons become in reality agents of the community, and the sanction behind the rules which they enforce may fairly be called legal.[26] But, for society to assume that paramount role, it must have first acquired sufficient vigor to enforce its will over its members.[27]

B. Ancient Law

The primitive system of vengeance has produced extraordinary evils. The private blood feud (*sangrienas guerras privadas*), for instance, has caused the extermination of many families. One who took vengeance did not recognize any principle of limitation in the exercise of the right and caused the offender and his family all possible evils. In order to avoid the pernicious consequences of unlimited reaction or ceaseless retaliation, the original barbaric system of vengeance was gradually palliated with the institution of the famous *talion* (punishment in kind; exaction of compensation in kind), "*similitudo suplicii,*" or *lex talionis*, under which a torment greater

[25] It is said that when primitive men became organized into groups, retribution tended towards becoming the concern of the group. Contemplating diverse groups of primitives, with their wide diversity in social organization, Kirchwey observes that a similar method of dealing with an offending member tends to emerge. "Custom, which established the rules of conduct in the group, was rarely violated and, when violated, may in extreme cases be executed by self-exile or the suicide of the offender, although more frequently he is subjected to public humiliation." Among other tribes, it has been observed that the "offender, if recalcitrant, may be brought before the headman or council of elders — not for trial in the modern sense, but for judgment" because his guilt is either known or assumed. The measure of punishment was the only question; this is usually fixed by custom but may be modified by bargain, except when the injured party or his group insists on "full payment". The latter case, maintains Kirchwey, leads to the threshold of the blood feud, which plays a major part in medieval law [Kirchwey, *supra* note 2 at 570].

[26] Self-help (*autoayuda*), thus ordered, meets the needs of early society in all cases in which the right to be enforced is clear, and its violation apparent, but it does not furnish a definite or certain mode of settling controversies. This lack is filled by oaths, ordeals, arbitrations, and at last by authoritative judgments [*Id.*].

[27] Kirchwey disputes that the community, however primitive, was ever indifferent to the common weal [*Id.*].

than that which was caused to the victim cannot be returned to the criminal.[28] The formula of "an eye for an eye and a tooth for a tooth" presided over the vindictive process.

Subsequently, however, the system was further mitigated by the recognition of settlement (*composicion*), by virtue of which the offended party and his families avoid the right of vengeance by means of compensation or the payment of a certain amount of money.[29] This constitutes, as Ferri[30] says, the initial progress in the punitive area.

Kirchwey, however, asserts that traits of self-help (*autoayuda*) survived long after orderly retaliation has become established, as exemplified by the hue and cry of the Germanic law, or in the throwing of offenders in the Tarpeian rock in the ancient Rome. The greater license in dealing with an

[28] PUIG PENA, *supra* note 1 at 39. "It marked a great mitigation in sentiment when, as in the Mosaic law, cities of refuge were provided to which an offender who has killed someone inadvertently or otherwise without malice might flee and escape the avenger of blood. Primitive societies had no penalties but death or exclusion from the community and the latter, as Cain reminded the Almighty, was the equivalent of death. The principle of exact retribution — an eye for an eye, a limb for a limb, a life for a life — which is found in some of the ancient codes, was an obvious mitigation of the earlier uniform rule of death for all offenses of a serious character and marks a distinct stage in the long period of supplanting private vengeance by public law" [Kirchwey, *supra* note 2 at 571].

[29] "The identification of the individual with his group is so close that a crime, for example a killing, committed by a member of one group (which may be a tribe or a village community of considerable size, all the members of which are bound by ties of blood) on a member of another group, becomes a group offense and any member of the injured group may, unless due compensation is made, retaliate on the offender's group by killing any member of it. The compensation to be paid is determined by the social importance of the victim of the crime. For a crime committed within the group, the death penalty is rare and is inflicted only for the violation of a tabu, as incest. But there is no `strict law' in the modern sense of the term. Nearly every liability, even for the violation of a tabu, if not too aggravated, may be compromised or waived" [*Id.* at 570].

[30] Italian criminologist (1856-1929) who, together with Cesare Lombroso and Rafael Garofalo, originated the positivist school of criminology, which has caused penal law to recognize the results of biological and social sciences and has affirmed the necessity of first studying the criminal and the medium in which he commits the crime and, only afterwards, studying juridically the crime committed; after his conversion to socialism, he ascribed to economic factors directly, or indirectly through heredity, a decisive role in the genesis of crime; he also called attention to the necessity of supplementing the Darwinian point of view, by which Lombroso and Garofalo justified the death penalty, by the Lamarckian, which emphasized the possibility of readaptation to the environment and favored the application of correctives to the delinquent; he propounded the doctrine of penal substitutes, according to which the legislator should supplement the repression of crimes with attempts at their prevention [C. Bernaldo de Quiros, *Enrico Ferri*, in 6 ENCYCLOPAEDIA 188].

offender caught in fresh pursuit is readily understandable on the basis of private vengeance, as it was less likely to be restrained in such a case.[31]

A curious exception to the evolutionary pattern of the system of private vengeance to the divine vengeance is that obtaining under the legal system revealed by the cuneiform laws.[32] The penal progress obtaining this early among the cuneiform laws, singular and forerunning in its temporal context, deserves a brief digression before an examination is made of the general pattern of development characterizing the ancient penal law of the rest of the Oriental world.

1. CUNEIFORM PENAL LAW

Present day knowledge of criminal law is derived largely from the criminal provisions, which are by no means inclusive. The cunieform scripts show that criminal law was an affair of the state, as there is no vestige of private vengeance, except in cases of adultery, nor was the religious principle dominant enough to be considered significant in its characterization.[33] But it was largely a private criminal law in that punishment was

[31] "The right of self-help was seen as indirectly operative in the increase of the fine allowed at a later stage in the case of a thief caught in the act. Thus, in the Roman law, the penalty in case of *furtum manifestum* was doubled (earlier, the Twelve Tables had provided that a thief caught in the act may be slain but the law has been changed by praetorian edict). This was not at all because detection in the act was an aggravation of the offense; the increased penalty was intended to induce the injured party to refrain from taking the law into his own hands" [Kirchwey, *supra* note 2 at 571].

[32] "By cuneiform law is meant all laws which make use of the cuneiform script for their written inscription, whose geographical scope, according to recent status of excavation, includes not only the original lands of the Babylonian civilization—Babylonia and Assyria—but extends in the East as far as the mountainous Elam region, reaching southward to the Sagros Mountains, while extending towards the west through Mesopotamia and Asia Minor to Syria and the Coast of the Mediterranean (chronologically began as early as 3000 B.C., down to second and first centuries B.C.). Obviously, there could not have been a uniform legal system covering that vast area and enduring throughout this long period." Historians consider the cuneiform script as serving the external criterion of the cultural influence of the Babylonian civilization as well as of a certain historical unity as is offered, by analogy, by the Chinese script. Paul Koschaker admits that a comprehensive outline of cuneiform law is possible solely as a comprehensive description of various legal institutions, to the extent that their juridic structure and their economic and social functions have been discovered. Such work unfortunately has been done only to a slight degree and least of all for the neo-Babylonian legal documents, which have been known longest of all. Hence, any outline thereof must necessarily be incomplete [Paul Koschaker, *Cuneiform Laws*, in 9 ENCYCLOPAEDIA 211].

[33] Although Hammurabi claimed divine inspiration by declaring in the preface to his code that the god Marduk directed him to deliver the principles of justice to the people (A. Arthur Schiller, *Lawgivers*, in 9 ENCYCLOPAEDIA 275-277); but *see supra* note 23, containing a passage where Kirchwey observes "the predominantly religious character of the x x x Babylonian Codes." [Kirchwey, *supra* note 2 at 571]; Cuello Calon, however, disagrees [CUELLO CALON, *supra* note 10 at 67].

meted out on behalf of the party wronged and not of the state. This was true of fines as well as of corporal punishment, since the latter could be remitted contractually through the payment of a sum of money. In several cases in the Middle Assyrian code of law, this was expressly stated and it may have been true to a wider extent.[34]

The concept of criminal guilt is outlined. The Code of Hammurabi and the Hittite law emphasized the deliberate deed in certain cases and punished it more severely. But, there existed a concept of guilt over and above such individual cases, although it was thought of objectively.[35] Indications to the effect that the concept of guilt had already begun to be based upon the subjective attitude of the doer, upon his actual knowledge or lack of knowledge of the crime may be found in the Code of Hammurabi and particularly in the Middle Assyrian code.[36]

On the other hand, there was no differentiation as to criminal responsibility, as indicated most clearly in the Hittite code, although penalties were graduated according to whether the injured party was a freeman or a slave or according to the rank of the culprit.[37]

The *lex talionis* was the dominating feature in the penalties of the Code of Hammurabi, together with frequent death penalty and the fine. Corporal punishment as a specific penalty was of slight importance. The Hittite code is similar but does not contain the *talio* as the measure of punishment. On the other hand, in the Assyrian penal law, corporal punishment (mutilation) and whipping play an important part, and in civil law the "bloody penalty" for breach of contract predominates.[38]

[34] In addition, there were the public offenses, which were prosecuted by the state; but its delimitions require further investigation [*Id.* at 214].

[35] For instance, it was held that the receiver of stolen goods was not a person who knowingly bought stolen property but a person who contracted a purchase secretly, without witnesses [*Id.*].

[36] *Id.*

[37] Koschaker explains that "the attitude corresponds to the relatively free position of the slave throughout the Near East; slaves were allowed to marry and to own a limited amount of property. Such leniency was probably due to the small number of private slaves, for the slave problem scarcely existed at all" [*Id.* at 215].

[38] "This and the outspoken description of sexual offenses, for which the refined Code of Hammurabi uses veiled terminology, are characteristic of the Assyrians as the somewhat complacent admonitions of the Hittite lawgivers for leniency and forbearance are characteristic of the latter" [*Id.*].

Collective responsibility was practiced. Such is manifested by the liability of the community in the Code of Hammurabi, and possibly in Hittite and Subraean law. The liability of the criminal's family is evidenced in the Hittite code, although, even here, it is already beginning to decline.[39]

2. ORIENTAL WORLD

In the Oriental world, in which the social power possessed sufficient vigor to impose among individual members norms of conduct, the complexion of retribution began to change. The law was like a transcendental cover for all and the religious principle prevailed upon the ethical life. Religion was the law. Every religious precept was accompanied by a juridical sanction, and every juridical enactment was a mandate of religion. This transformed the barbaric system of vengeance in terms of its end. Vengeance was still recognized but this time, it has become divine vengeance (*venganza divina*).[40]

The ancient penal law of the Oriental world was thus dominated by the religious or divine principle.[41] The penal codes, which were usually god-given or divinely inspired, were permeated by religious sentiments.

[39] *Id.* It is perhaps inaccurate to classify the cuneiform laws under primitive law, as their provisions, as earlier noted, even indicate a stage of development far advanced than some of those classified with the ancient Oriental penal laws. In fact, under the unilinear evolutionary perspective, one historical stage is not quite distinctly separated from its successor; the multilinear perpective might regard the development of the legal system under the cuneiform laws as proof of diffusion, of a distinct culture pursuing its peculiar stream of development, independently of and without parallelism with those of others. Another view would, however, see a partial connection between the cuneiform laws and those of Mosaic laws, which manifest indications of having been patterned after, if not heavily influenced by, the code of Hammurabi. In this Chapter, however, apart from the fact that the cuneiform laws were anterior in time to those of the Mosaic laws, reasons of convenience also dictated the location of discussions on the subject, in respect of which, as already indicated, the religious principle, albeit certainly not absent, did not appear predominant.

[40] Puig Pena and Cuello Callon say, to the same effect, that during the period called divine vengeance (*venganza divina*), penal repression took as its end the atonement of the divinity (*el aplacamiento de la divina*) offended by the crime. The criminal justice was exercised in the name of God, and the judges adjudicated in His name; the penalties being imposed upon the criminal was an expiation for the crime and to appease the anger of the divinity, in order to win back His grace and to merit anew His protection. In almost all peoples, he further observes, this moment has been manifested, although with more rigor among the Hebrew people. Summarizing, he notes that this was the spirit of the penal law of the antiquity among the other peoples in the Orient, in addition to Israel, India, Persia, Egypt, and China [*See* PUIG PENA, *supra* note 1 at 39; CUELLO CALLON, *supra* note 10 at 58; inviting attention to THONISSSEN, ETUDES SUR L'HISTOIRE DU DROIT PENAL DES PEUPLES ANCIENS (1945)].

[41] Crime constituted an offense against the divinity; the penal justice is exercised in its name and the penalty was not predicated on anything else but to placate it (*placatio, supplicium*, were the antiquated names for the penalty) [PUIG PENA, *supra* note 1 at 39].

Crime was an offense against the divinity and penalty was an immolation of the offender to the offended divinity, in order to placate his anger.[42]

An exception to this religious sentiment could be found in the more ancient of the known Oriental codes — the Code of King Hammurabi.[43] The more extraordinary features of this piece of ancient legislation are its liberation from religious concepts and the fine distinctions that it makes between acts voluntarily executed and those resulting from imprudence. Vengeance, as such, was almost unknown in this code, but on the contrary, the *talion* has had an enormous development, reaching extremes that were inconceivable.[44]

a. Israel

As to Israelite legislation in the age of the patriarchs,[45] it is difficult to establish what has been its penal law. Popular or customary law, as depicted in the patriarchal narrative, was derived chiefly from the experience of a nomad people. The codified laws of the Pentateuch go back to a later period when the population consisted mainly of peasant landowners, with foreigners, chiefly day laborers or those engaged in trade and various crafts, living among the peasants.

The foundation of the social structure was the tribal community, which was divided into families and kinship groups. The kinship group was headed by its chief, whose authority in the earliest period was so great that he could pass a sentence of death upon the members of his group.[46] At a later period, the authority of the head of the family diminished. Accord-

[42] CUELLO CALON, *supra* note 10 at 58; PUIG PENA, *supra* note 1 at 40.

[43] Who reigned in Babylon at approximately 2,250 years before the Christian era. The discovery of this body of laws is due especially to the German Assyriologer Winckler, who descripted and translated to the German language the original Babylonic inscription in cuneiform characters VID. WINCKLER, DIE GAZETTE HAMMURABI KOENIGS VON BABYLON, (1903); MANZINI, IL DIRITTO PENALE NELLA PIU ANTICA LEGGE CONOSCIUTA IN RIVISTA PENALE 662 (1903) [CUEI LO CALON, *supra* note 10 at 67].

[44] One could find dispositions such as the following: "the son of him who kills another shall die, if such killing has been involuntary", "if one blinds another, he shall also lose his sight," "if one breaks another's bone, he shall have his own broken" [*Id.*].

[45] The patriarchs of the sagas in Genesis are legendary heroes, artificially connected with Israel. Some of the Hebrew clans entered Canaan in the Amarna period (14th cent.); others roamed in the wilderness. The Joseph tribes settled at Goshen, in the eastern Delta of the Nile. Moses led a revolt of the Joseph clans in Egypt, after they had been enslaved by Ramses II, and brought them to the oasis of Kadesh [WILLIAM L. LANGER, ENCYCLOPEDIA OF WORLD HISTORY 30].

[46] THE HOLY BIBLE, Genesis XXXVIII: 24.

ing to the codified laws of the Pentateuch, the father could not judge a rebellious son, who had to be haled before the elders upon the complaint of both parents.[47] The elders usually held court at the city gate. Later, the authority of these elders was restricted by the organization of centralized courts, which acted as courts of appeal. These central courts were located at the sanctuaries.[48]

The written penal law of the ancient people of Israel was contained principally in the first five books of the old testament, attributed to Moses and denominated as the Pentateuch (in *Exodus, Leviticus* and, above all, in the *Deuteronomy*, where the greater part of the Mosaic penal precepts are embodied).[49] On these bases, one may infer that the spirit of the penal legislation was impregnated by a profound religious sentiment. The right of punishment was a delegation of divine authority. Crime was an offense against God, whose forgiveness is implored by means of expiatory sacrifices. Penalty was imposed with the end of expiation and of intimidation and its measure was the *talion*, which at times was absolute, like in homicide (life for life), or proportionality (payment by a multiple of the value of the object stolen),[50] and exemplarity.[51]

Common principles found in Israeli law worth noting are: the personal nature of criminal responsibility, the equivalence (in terms of exacting retribution) of the penalty to the crime; and the acknowledgment of free will.

Collective responsibility was provided under the old common law and, therefore, punishments were applied in certain cases to the whole

[47] THE HOLY BIBLE, Deuteronomy XXI: 18-20.

[48] Trial by ordeal was employed or the disputants were sworn under oath at a holy spot (Gulak, *supra* note 14 at 219).

[49] "The codified Biblical laws according to the period of their composition are usually classified as follows: the Decalogue (Exodus XX: 1-17; Deuteronomy V; 6-19), the Covenant Code (Exodus XX: 23; XXIII: 19; and XXXIV: 17-26), the twelve curses of Mount Ebal (Deuteronomy XXVII: 15-26), the Deuteronomic Code (Deuteronomy XII-XXVI), the Holiness Code (Leviticus XVII-XXVI), and the composite Priestly Code. All that is known historically is the existence of the book of Deuteronomy in the Kingdom of Judaea during the reign of Josiah and of the codified laws of the Pentateuch during the period of Nehemiah and Ezra. Many legal prescriptions in all parts of the Bible are, however, extremely ancient, as is proved by comparison with Assyrian and Babylonian law" [*Id.*].

[50] CUELLO CALON, *supra* note 10 at 67-68. For the history of penal law of the Israeli people, like those of the rest of the Orient, Cuello Calon refers to THONISSEN, ETUDE SUR L'HISTOIRE DU DROIT CRIMINEL DES PEUPLES ANCIENS.

[51] PUIG PENA, *supra* note 1at 42.

laws of Egypt had been compiled in what was called the *Sacred Books*. This had not survived to our time, although it has left some mold of its contents.[62]

The existence of the *lex talionis* in the ancient Egyptian penal law is now regarded as a matter not definitely provable. Punishments were very severe but offenders were sometimes allowed to commit suicide. Unfortunately, the two greatest records of such criminal trials which are available relate to exceptional cases — a trial of a royal harem conspiracy or of tomb robbers — that it would be unsafe to generalize from them regarding the normal procedure for penal application. More reliable are the *ostraca* and *papyri*, in hieratic characters, which contain the proceedings of criminal trials during the so-called New Kingdom (1580-712 B.C.). The sentence is here pronounced on the basis of a divine oracle.[63]

However, some modern treatise writers maintain that, in Egypt, we may see a magnificent glimpse of exemplary penal justice, and the Egyptians were the first to recognize the high value of public opinion in the sphere of crimes.[64]

c. China

Puig Pena and Cuello Calon note that all of the ancient Chinese laws were likewise influenced by religion.[65] In the primitive laws contained in the *Book of Five Penalties*, there is said to be a frank reference to this tone.[66]

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[62] PUIG PENA, *supra* note 1 at 40.

[63] Erwin Seide, *Egyptian Law* in 9 ENCYCLOPAEDIA 249-254.

[64] PUIG PENA, *supra* note 1 at 40.

[65] However, there are authors who find that there is no indication of the dominance of the ethico-religious principle in ancient Chinese laws, except among the philosophers of the Chinese School of Laws, or *Fa chia*, whose conception is infinitely closer to the Judaeo-Greco-Roman conception and who opposed the Confucianists. But despite the efforts of this school of legists, which furnished an essential contribution to the elaboration of Chinese juridical theories and resulted in the founding of the first absolute kingdom, that of *Ch'in*, in 225 B.C., it was the Confucian conception that dominated all ancient Chinese legislation [Jean Escarra, *Chinese Law*, in 9 ENCYCLOPAEDIA 249-254].

[66] The Chinese always believed in a universal natural order existing in the heart of man as well as in the physical universe. Their cosmogony establishes correspondences between the five human relations (*wu lun*) — of prince to subject, father to son, husband to wife, elder brother to younger, friend to friend — and the five planets, the five sounds, the five metals, the five cereals, the five colors. Note the absence of reference to dieties or divinity. However, an immense role was always ascribed to magic, horoscopes, the action of elemental influences and the like, but this does not indicate the sentiment of ethico-religious principle [Escarra, *supra* note 65 at 253].

The penalty has tended towards vengeance of *talional* character, although when this is not applicable, recourse is made to forms of symbolic *talion*.[67] This law has been followed by other equally ancient localities (some would put it at 2,205 B.C.).[68]

The Chinese penal system, among others, appear in the monumental Chinese imperial code, *The T'ang Code* (653 A.D.), of which there are available fragments of information in ancient Chinese literature. A modern work of Cheng Chu-te covering the legislation of the Chinese dynasties between 206 B.C. and 618 A.D. described the first imperial legislative monument as being made up of penal sanctions, without distinguishing between penal and civil responsibility. Even as late as the nineteenth century, it was observed that the Chinese had not developed any true system of private law, leaving a large sphere of regulation either to the family, under Confucian concepts; or to the guilds, for the settlement of commercial disputes. Such rights which are called private in the west were normally secured by penal sanctions.[69]

At the head of the dynastic codes came a series of tables and chapters devoted to the enumeration of penalties; to the release from penalties by payment of a fine; to rules of kinship, which were taken into consideration in cases of increase or decrease of penalties; to general theories of responsibility and such doctrines as incrimination, excuses, complicity, accessories, and attempts. The celebrated "*Five Punishments*" of Chin were never constant and had frequently varied in nature.[70]

The fact that these general theories figure at the head of the code is significant. The Chinese were apparently brilliant criminologists and in the course of their long history elaborated a majority of the concepts which today inspire the penal laws of civilized states. Departing from the cherished juristic principle that "punishment must be eliminated by punishment", they gave preference to an objective conception of responsibility and to a strengthening of the intimidating character of penalties. Behind the most involuntary deed, the slightest objective risk, they sought a re-

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[67] PUIG PENA, *supra* note 1 at 41.

[68] CUELLO CALON, *supra* note 10 at 68; the most ancient Chinese codifications, such as the *Book of Penalties* in nine chapters has been estimated by others to be of 1050 B.C. vintage.

[69] Escarra, *supra* note 65 at 252.

[70] *Id.*

sponsible person. The notion of proximate cause was in an embryonic state.[71]

Its rules for imputability were, however, primitive and too expansive. When the natural order was disturbed, someone in the universe had necessarily committed a fault; even children, idiots and animals could be punished.[72]

Collective or vicarious responsibility, as basis for incurring criminal liability, extending not only among relatives but among officials, has had a long history in China.[73]

Finally, in a very crude form the Chinese knew the modern objective conceptions of social danger and measures of security.[74]

d. India

In India, there was an extraordinarily interesting piece of legislation called the Code of Manu[75] (*Manava Dharma Sastra*), dating back to the eleventh century B.C., which some authors considered as the more perfect among those of the ancient Orient.[76] The spirit of this Code is likewise absolutely religious. The right to punish emanates from *Brahama*, although the king is the delegate of divinity. Apart from this, two notes particularly characterize this law. The first is that — a curious thing — it does not employ the *talion*. The second is that the constant spirit of justice molded its precepts and clearly highlighted the need for justly applying the penalty. Its sentiment of justice has, however, been disregarded by its division of society into castes and by its religious prejudices.[77]

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[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] Manu, the Brahman lawgiver, was a minor diety, who is said to have been, as other lawgivers, divinely inspired [Schiller, *supra* note 60 at 275].

[76] PUIG PENA, *supra* note 1 at 41; he refers to CUELLO CALON, *supra* note 10 at 68. However, as distinguished from the Pentateuch of Moses and the Koran of Mohammed, which were mainly of religious and theological nature; or the Code of Hammurabi or Draco's decree, which emphasized the penal element; the Code of Manu has been described as purely theoretical and prescribing only a goal to be attained [Schiller, *supra* note 60 at 275].

[77] CUELLO CALON, *supra* note 10 at 68; PUIG PENA, *supra* note 1 at 41.

Finally, it distinguished imprudence, negligence, and fortuitous event from each other. Together with other principles, there are other precepts to be found which, from the contemporary perspective, would appear extravagant and ridiculous.[78]

e. Iran (Persia)

The Persian legislation is principally contained in the *Vendidad*, a principal part of the *Avesta*.[79] Like in the previously discussed laws, the Persian law also had a sacred and expiatory character. The law on punishment emanated from the divinity. It penalized more severely religious crimes and proclaims — as in India — that the expiation of the penalty redounded to purity.[80]

3. GRECO-EGYPTIAN MEDIUM: HELLENISTIC PENAL LAW

The immediate connection between the laws of eastern Europe and those of the Orient is not furnished by Greek law, which remained impervious to Oriental influences, but by the Hellenistic or Greco-Egyptian law.[81] The Hellenistic law did not manifest an orientation toward the religious principle, but a marked tone characteristic of the political principle.

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[78] CUELLO CALON, *supra* note 10 at 68.

[79] Zend-Avesta, prayer book of the Zoroastrian religion; forms the sacred books of the Zoroastrians known as Parsis, or Fire Worshippers, who live in small communities in parts of India and Iran; preserves the doctrines of this ancient belief and a record of the customs of the earliest period of the Persian history. During the antiquity, Zoroastrianism was the religion of the later Archaemenian kings, and the creed of the Persian Kings Cyrus, Darius, and Xerxes; its power weakened as a consequence of the conquest of Persia by Alexander the Great, in the 4th century B.C., at which time many of the sacred books of Zend-Avesta were lost [3 FUNK AND WAGNAL'S ENCYCLOPAEDIA 858-859].

[80] The idea of "penalty redounding to purity" is, etimologically, embodied in the concept of punishment (French *peine*, Latin *poena*, Greek *poine*), which derives from the Greek root *pu*, meaning "to cleance" [Hans Von Hentig, *Punishment*, in 12 ENCYCLOPAEDIA 712-715].

[81] Schiller states that: "Hellinistic law is the law which developed in the Hellinistic Epoch, that period in the cultural history of the eastern Mediterranean world between the time of Alexander the Great and the conquest and acquisition of the area by Rome. Hellenistic law, as a compound of Greek and original elements, did not perish when Rome absorbed the eastern Mediterranean world but continued to exist for centuries alongside the imperial Roman law.

"The great majority of the extant Hellenistic law derive from Egypt — despite its vast area the Hellenistic world has bequethed comparatively little in the way of legal sources to modern times; the treatment of the Hellenistic law must be confined to that locale. Strictly speaking, the Hellenistic law refers to Greco-Egyptian law, in respect to which the inscriptions of mainland Greece are of little value, because in those localities the oriental influence was slight". [Schiller, *supra* note 60 at 229-235].

No juristic commentaries or legal-philosophical writings, however, are extant to reveal the theoretical jurisprudence of the peoples of the Hellenistic world. Laws seem to have been derived from legislation or customary law.[82]

The Crynaean inscriptions were the most important non-Egyptian sources of criminal law. In terms of modes of incurring criminal liability, culpable or malicious acts and non-malicious acts were the two classes of crimes in Ptolemaic law.[83] "Murder," for instance, was either malicious or negligent.

In terms of specific offenses, there are indications of both public and private crimes and a clear distinction was observed between the two.[84] A Laconian inscription dealing with treason and a criminal action for violation of sepulchers in a Nazareth inscription are considered significant on this point. Certain acts of public violence and intentional extortion by officials were crimes. Illegally evading taxation was a criminal act. Crimes against regal monopolies and domains were punished, and the violation of an asylum was a sacral crime. Personal injury led to a criminal action, although the Alexandrian law of personal injury differed from that of the rest of Egypt. Theft, injury to property, whether malicious or negligent, particular frauds and the giving of false testimony conclude the list of private crimes. Death and imprisonment as punishment were relatively infrequent. Fines and confiscation were the usual penalties.[85]

Under the Roman regime there was apparently no decided change. More categories were added to the crime of physical violence, with public whipping as the penalty. Pederasty and incest were considered crimes against the communal interest. Whipping and condemnation to the mines were added to the punishments previously existing.[86]

[82] The Hellenistic legal system had no outstanding lawgiver, unless Ptolemy Philadelphus (285-246 B.C.) of Egypt be so designated [*Id.* at 276].

[83] The view that crimes were, at that time and locale, classified into private, tax, imperial public and sacral crimes is now rejected [*Id.* at 234].

[84] Private crimes were subject to police or court procedure; special trials were provided for the rest. Single officials and certain courts had criminal competence [*Id.*].

[85] *Id.*

[86] *Id.*; the circuit court of the prefect had judicial power, while various minor officials exercised police juridiction.

The Byzantine epoch more clearly separated public and private crimes, but there was little change in the substantive law. The falsification of weights and the clipping of coins were important fiscal crimes, while in the early times Christianity and later heresy constituted public crimes. Punishment depended on the status of the accused, whether he was of the lower (*humilior*) or the upper (*honestior*) class of society.[87]

4. GREEK EPOCH

The Greek law signaled the transition from the religious or divine, to the political principle. It also closed the cycle of the Oriental phase and marked the transition toward the Occidental.[88] It is, as Thonissen[89] says, the boundary between both worlds. In effect, it may at first be observed that in the legendary Greek epoch, the system of pure vengeance dominated in principle, with all its terrible consequences. Later on, there arose the state, the religious principle emanating from Jupiter's right to punish, subsequently called the historic epoch, affirming a penalty not based on religious foundation, but on moral and civil bases. As Cuello Calon says, it was during this time that doubts about the gods began and reasons for the state to dominate as sovereign emerged. This means, that the political principle has appeared to substitute for the religious.[90]

When one studies the Greek penal law, however, there is a need to take into account the following considerations:

[87] *Id.*; parethetically, a step further than the determination of punishment based on social rank obtaining under the Code of Hammurabi.

[88] Excavations made in Dura-Europos, on the eastern rim of Hellenic culture, reveal connections between Greek and Oriental legal systems. Just how strong an influence it was on Greek legal culture is a continually recurring problem [Leopold Wenger, *General View of Ancient Law*, in 9 ENCYCLOPAEDIA 207].

[89] Jean Joseph Thonissen, Belgian jurist and statesman (1816-91); one of the most authoritative representatives in Belgium of the classical school of penal law, upholding the traditional conception of crime and punishment. Capital punishment he opposed not as illegitimate but as unnecessary, and the polemic launched by his *De la pretundue necessite de la peine de mort* (Louvane: 1862) resulted in the virtual if not legal abolition of the death penalty in Belgium; his outstanding achievements were his studies in legal history, in which he set out to trace the legal evolution of penal law from antiquity to modern times; in this field he published, among others, *Etudes sur l'histoire de droit criminel des peuples anciens* (2 vols.; Brussels: 1869); in 1886, he became a member of the Chamber of Representatives, and played an important part in the elaboration of important laws, such as the law on preventive detention, the law on liberation and conditional condemnation and the Law of 1878, modifying the preliminary section of the Code of Penal Procedure; in 1877, a commission was set up to prepare the reform of the Code of Penal Procedure and Thonissen was appointed its reporter [Fernand Collin, *Jean Joseph Thonissen* in 14 ENCYCLOPAEDIA 621].

[90] CUELLO CALON, *supra* note 10 at 69.

a. Diversity of Sources

It is not possible to speak of Greek law as one law, but that it is better to distinguish between the different pieces of legislation effective in the various states. Cuello Calon, expressing the same perspective, says that the penal law of Greece was scarce and none of it was precise. It suffers from lack of unity because, as an author maintains, one could not properly speak of a Greek law, but of the law of Crete, the law of Sparta, the law of Athens.[91]

Some authors, however, believe that although the entire area of Greece consisted of a number of small states each with its own legislation, it was possible to single out the inner unity and homogeneity of all these legal orders, thereby achieving the concept of a universal form of Greek law which transcended the diversity of the various Greek juridic systems. Since Greeks themselves felt their laws to be a unity, one Greek polity would not object to the taking of judges from another or adopting the laws of another, particularly the laws of Athens. As to content, law was not to be looked upon solely as a human institution. It was assumed to be based upon supernatural institutions, emanating from the divine will, although tending especially toward the views of the aristocratic upper class in power at that time, and sanctifying the concept of the specific rights of the individual under divine prescription.[92]

b. Paucity and Incompleteness

The text of the laws that were enacted were almost totally destroyed and, for that reason, one could only achieve an incomplete knowledge of Greek penal law.[93]

Of the scarce data available, very few concern Greek legislation.[94] These sources are also extremely scattered. In the first place, it is necessary to rely largely on epigraphic and literary records, some of which are the judicial speeches of the Attic orators. In the second place, it is likewise necessary to rely on the ancient commentaries upon the literary records, often in the form of lexicons (*Lexica Segueriana, Polux, Suidas* and the like). There

[91] *Id.* at 68.

[92] Egon Weiss, *Greek Law* in 9 ENCYCLOPAEDIA 225-229.

[93] PUIG PENA, *supra* note 1 at 42.

[94] CUELLO CALON, *supra* note 10 at 68.

survives only one ancient treatment of the problems of Greek law on contracts, dealing principally although not exclusively, with the transfer of real estate. Primary among the available inscriptions are the so-called Code of Gortyn in Crete[95] and the Draconic laws on homicide.[96] Also, Plato's *Laws*, and to a lesser extent his *Republic*, may also be considered as sources.[97]

In Sparta one would find the legendary figure of Licurgo, whose laws were given toward the middle of the 9th century before Christ. Tradition has preserved some of its particulars, like the impunity of the theft of objects for nourishment (*objetos alimenticios*) committed by adolescents, the punishability of celibacy, and the crime consisting of piety to one's slave.[98]

Little is known of the legislation of Athens. Its principal legislator was Draco (7th century before Christ) whose laws were probably the first written laws of Athens. In the laws of Draco, the law of vengeance was limited.[99] It distinguished between crimes that offended the community from those that merely injured individuals; the first being penalized with extreme severity, while the latter being punished with benign penalties.[100]

c. Threshold of Transition

While it is possible to establish the periods we may refer to, this does not determine an incisive separation among them. In the final phase, for example, there existed the mold of the previous principles. These were beginning to weaken in the ethical consciousness of the people and being gradually substituted by those that followed.[101]

[95] First discovered in 1884 and last edited by Kohler and Ziebart, dating from about the fifth century A.D. [Weiss, *supra* note 89 at 225].

[96] In the revised version which dates from the same century [*Id.*].

[97] *Id.*

[98] CUELLO CALON, *supra* note 10 at 69; *citing* LEVI, DELITTO E PENA NEL PENSIERO DEI GRECI 20 (1903).

[99] *Id.*

[100] *Id.*; noting that the distinction is one of the more characteristic of the Greek penal law [*citing* THONISSEN, *supra* note 89 at 476].

[101] PUIG PENA, *supra* note 1 at 42.

d. Orientation Towards Political Principle

As already stated, the salient aspect of this law — which has been principally determined by its situation in the historical epoch — is the transition to the political principle, which determined the law (1) in terms of the *jus puniendi*, because this was gradually attributed to the competence of the state; (2) in terms of the crime, because it was no longer an offense against divinity, but an attack against the interests of the state (this may be drawn from the fact that in Greece, there was a division of crimes according to whether it attacked the interest of all or simply the right of an individual, reserving to the first group the more cruel penalties); and (3) in terms of the penalty, because its end was essentially intimidative, not expiatory, unlike in the previous period.[102]

The so-called principle of personality was an axiom of Greek law. Wherever Greeks dwelt, every citizen of every Greek polity was to be judged according to the laws of his homeland. Greek law often influenced Roman law, especially in the establishment of the Twelve Tables, as is evident from their very mode of origin. The *decemviri legibus scribundis* who drafted them were not merely a codifying commission but were also among the highest magistrates, occupying positions that corresponded to those of high ranking Greek officials in many respects. In the Hellenistic period, law in the mainland of Greece remained largely unadulterated by Oriental influences.[103]

The Greek criminal law was originally based upon the concept of vengeance. The famous trial scene which depicted the shield of Achilles already indicates perhaps the substitution of compulsory composition for the unmitigated blood feud. Originally, only the injured person or his kin might take action, but at a later date it became the rule — probably generally, in Athens — that every citizen might prosecute offenders, an innovation introduced by Solon. This system of prosecution, however, was not based upon a division of wrongs into criminal and civil. Rather, suits were regarded as either private or public, depending upon whether the object was the redress of a private wrong or the infliction of a public punishment. But great freedom was maintained in the choice of the form of suit.[104]

[102] *Id.*; CUELLO CALON, *supra* note 10 at 69.

[103] Weiss, *supra* note 92 at 225.

[104] *Id.*

Vestiges of the older system are represented by the provisions of the laws of Draco. Prosecution for murder might be undertaken only by the relatives of the victim. If these were not forthcoming, the *phratry* (a group of several families) might prosecute. The relatives, as well as the dying victim, however, had a right of forgiveness. In view of this family solidarity in the criminal law, it is not surprising that such a consequence of a crime as disenfranchisement was visited not only upon the offender but also upon his children.[105]

A marked feature of Greek criminal law in the age of democracy was the very great variety of political offenses which might be committed not only by officials but by ordinary citizens. Greek law, as the law of a people of great cultural achievement, laid great emphasis on the element of will in legal transactions.[106]

A distinction was made in Greek penal law, at a relatively early date, between evil intent, negligence, and accident. Among the penalties of the Greek criminal law were (1) death; (2) loss of freedom by enslavement which, however, was applied not only to non-citizens; and (3) fines, which were either fixed by statute or by judicial discretion. Neither mutilation nor penal imprisonment were ever resorted to. All Greek communities practiced the confiscation of the offender's wealth for the benefit of the state. Only in a few cities, as in Lacedaemon, was whipping used as a punishment, especially for children and for slaves who could not pay a fine.[107]

It may be concluded, as regards the Greek penal law in the ancient times, that during its first moments, private vengeance dominated. Vengeance which was not confined to the offender, but radiated as well to the entire family group. A second period of religious character arose upon the birth of the state, which dictated the penalties, acting as minister of divine volition. One who commits a crime offensive to the divinity should be purified by its ministers, religion and state being identical and the crime against one and against the other being more atrocious. There appeared, finally, a third moment, in which the justice of the gods began to be doubted and the penalty had lost its religious basis. It was instead seated upon civic

[105] *Id.*

[106] *Id.*

[107] *Id.*

and moral foundations. Between one and the other period there existed no profound difference. The new concepts rose jointly with the ancient, which did not disappear regrettably, but had only weakened the juridical consciousness of the people.[108] During the final moment, which should be called "political," as contraposed to the "religious," the Greek penal law served as the transition between the Oriental and Occidental legislation, lying at the boundaries of both worlds and constituting a transcendental page in the annals of the development of the human spirit.[109]

5. OCCIDENTAL WORLD

European historical accounts of the evolution of penal law in the Occidental world invariably started with the Roman penal law. Towards the Middle Ages, the vision shifted to Germanic penal law and the Canon penal law, and then moved on to the various local legislation which proliferated in the later part of the Middle Ages, where the various elements of Roman, Germanic and Canon penal laws were eventually confused, leading to the development of the so-called European common penal law.

6. ROMAN PENAL LAW

The first monument of Roman penal law was called the *Twelve Tables* which pertained to the 5th century before the Christian era. In the classical epoch of the penal law, these were principally contained in the *Leyes Corneliae* and in the *Leyes Juliae*, as well as in the *senatusconsulta*, in the *edicta* and the *responsa prudentium*. A great quantity of these materials are known only in fragments, part of which came from the *Digesto* (Books 47 and 48). The penal law of the imperial epoch were contained in the Imperial constitutions, which has reached the modern times through the Codes of Theodotius, Justinian, and the *Novellae*.[110]

It may be said that in the origin of the Roman law, there appeared, as in the case of legislation of other peoples, vestiges of the system of vengeance, of *talion*, of settlement or composition (*composicion*) and divine expiation (as exemplified in the religious and sacral crimes). But in Rome, the differentiation between the law and religion was finally achieved. This

[108] CUELLO CALON, *supra* note 10 at 69; *citing* LEVI, *supra* note 98 at 227-228.

[109] *Id.*

[110] CUELLO CALON, *supra* note 10 at 70.

ushered the culmination of a new penal law with the triumph of public penalty, imposed with the predominant end of preserving public tranquility, and the absolute recognition of the political principle.[111]

This subsequent absolute consecration of the political principle was configured in the following manner:

a. Inception of Political Principle Under Roman Penal Law

It was known that during the initial period (up to the 7th century) the separation between infractions affecting the public juridical order or violations of the collective interest (*crimina publica*), was synthesized in particular in the *perduellio* (which distinguished political crimes) and the *parricidium* (which distinguished the common crimes), including those that concerned the private juridical order or injure exclusively the rights of particular persons (*crimina privata*).[112] At this time, the penalty tended to the satisfaction of the victim of the crime and to the reparation of the damage caused. It was the hour of intimidation, the hour of making amends, the hour of expiation, but pursuing an ultimate and supreme end: the defense of society.[113] However, with the subsequent increase in the number of those falling under the category of *crimina publica* and of their importance *per se*, the statist construction of the punitive law progressed.[114]

b. Accentuation of Political Principle

The penal authority, which was initially unlimited, was gradually restrained with institutions of marked political complexion. This was demonstrated, in particular, by the *provocatio ad populum*, through which the people can bring about their sovereign decision on matters of punishment. Therefore, in time, all the penalties, from minor to the grave, were

[111] PUIG PENA, *supra* note 1 at 42; CUELLO CALON, *supra* note 10 at 70.

[112] *Id.*

[113] Cuello Calon observes that the Roman penal law did not reach the high plane to which its civil law was elevated by history, considering as cause of this imperfection the distinction between crimes that are public and private, as a consequence of which, although they were true crimes, they were regulated merely in the same way as injustices of civil law; there were numerous loopholes (*lacunas*) which at the time of the empire gave way to the exercise of discretion, to the diverse penalties which, in the time subsequent to Hadrian, were imposed upon the *honestiores* and the *humiliores*, and to diverse proceedings. [CUELLO CALON, *supra* note 10 at 70].

[114] PUIG PENA, *supra* note 1 at 43.

subjected to the *provocatio*, with which the penal practice had taken an eminently public character.[115]

c. Radical Transformation of Procedure Under Political Principle

Toward the end of the Republic, a radical transformation came about with what was called the system of *quaestiones*, or temporal tribunals, which thereafter became permanent (*quaestiones perpetuas*). When the provinces sued against their governors for the restitution of what were taken from their subjects, a permanent commission of the senate established the first *quaestio* in order to adjudicate cases of *crimen repetundarum* (illegal exactions). Subsequently, the proceedings of the *quaestiones* were extended to other classes of crimes, particularly those political in character. Finally, it was extended to common crimes on the basis of special laws (*leges especiales*). Thus appeared the *leges Corneliae* and the *leges Juliae*, which jointly formed the nucleus of the Roman penal law, and the subsequent modifications related to some of them.[116]

The proceedings of the *quaestiones* were of singular interest in the juridical plan of the law, such that each one of the *leges* established as a crime an action that is legally determined (*crimen legitimum*). This represented a great advance in the more precise formulation of types. This also developed together with a penalty that was likewise fixed by law (*poena legitima*) and there was instituted a tribunal to take cognizance of these cases (*quaestio*). Lastly, *dolus* became necessary in these crimes. The attempted stage of the crime and complicity were ordinarily penalized in the same manner as in the consummated stage and the authorship, and the judges were obligated to make pronouncements regarding culpability or inculpability.[117]

d. Emergence of Crime of Intermediate Grade Between the Public and the Private

Finally, for the duration of the imperial epoch, the *ordo judiciorum publicorum*, which embodied all that have been previously described, was substituted by the *judicia publica extraordinem*, with delegated jurisdiction

[115] *Id.*

[116] *Id.* at 44.

[117] *Id.*

from the emperor. The penal legislation was thus detained in its evolutionary process. But there is one note of singular interest: the appearance of the *crimina extraordinaria* to represent an intermediate grade between *crimen publicum* or *legitimum* and the *delicta privata*. The definition of *crimina extraordinaria* was taken from the field of private crimes (*furtum, rapinna, injuria*, etc.), augmented by new delictive concepts (*stelionatus, estafa, raptus, expositio infatium*, etc.), as well as by the contribution of religious crimes taken from Constantine (*apostaia, herejia, blasfemia*, etc.). It is a source of relief that the penalty was not immutable like the *poena legitima*, but was adaptable according to judicial discretion exercised in concrete cases. The subjective aspect passed to the first level. The penalties during the imperial epoch were very strong and, in general, what dominated the imperial penal law was the following principle: "The preservation of the state is the foundation of punishment."[118]

II. MIDDLE AGES

The second stage in the development of penal law is best represented in the Visigothic, the Anglo-Saxon and other Germanic codes, which form the immediate background of the penal law of western Europe.[119]

In general, the Middles Ages is characterized as the epoch of uncertainty.[120]

In the examination of the Middle Ages we should make a separate study of the Germanic[121] and Canon penal laws, as well as the so-called European common law (referred to in most modern literature as the law of the "ancient regime").

[118] *Id.* at 44-45.

[119] The Germanic penal law has a great importance for having influenced notably the formation of the Spanish penal law of the Middle ages. In the Spanish law, the sources of the law were: the ancient Germanic laws, which have been recompiled and translated to Latin with the name *Leges Barbarorum*, the Roman laws that were provided by the Germanic kings, and the capitulation laws of the French kings. Of great interest also as sources of the Spanish penal law were the Germanic laws of the Scandinavians, Danish, Swiss, Norwegian and Icelandic [CUELLO CALON, *supra* note 10 at 70, n. 13, *citing* WILDA, DAS STRAFRECHT DEL GERMANEM 7 (1842); Del Guidice, *Diritto penale germanico rispetto all'Italia*, in THE 1 ENCYCLOPEDIA OF PESSINA 437].

[120] PUIG PENA, *supra* note 1 at 45.

[121] Germanic law is the law not only of modern Germany but of all the Germanic peoples, that is, of the tribes called Germans or Teutons because of their language or origin. The principal Germanic tribes were the North Germans, or Scandinavians (Norwegians, Swedes and Danes), the East Germans (Goths and Burgundians) and the West and South Germans (Germans, Frisians, Lombards, Angles and Saxons) [Eberhard Von Kunssberg, *Germanic Law*, in 9 ENCYCLOPAEDIA 236-239].

A. Germanic Laws

The Germanic laws were, in general, dominated by the individualist principle.[122]

According to Pessina,[123] the Germanic laws contributed an element to the evolution of the penal law which in the Roman laws did not appear to have been determined. This element is the value of the individual (the individualist principle),[124] which appears to have predominantly constituted the foundation of all their penal institutions.[125]

There is, however, a need to distinguish between the Germanic laws prior to the invasion and those subsequent thereto.

[122] According to Cuello Calon, the Germanic penal law, does not entirely lack the sacral or religious element, but it is not as clear or manifest as in the Roman penal law. [CUELLO CALON, *supra* note 10 at 72.]

[123] Enrico Pessina (1828-1916), Italian Jurist and statesman; professor of penal law and procedure in the Univesity of Naples; worked with Zinardelli on the Italian Penal Code of 1889 and inspired legislative reforms which were of great importance in helping to guarantee the autonomy of the judicial function.

[124] It is almost ironic that this contribution arose from a people that Kunssberg described as a clanish race. Indeed, the basic principles of Germanic legal order were peace and freedom. "Peace must prevail in the juristic community of the people as well as in the smaller and special groups, a concept of peace that led to mutual aid and adaptation, as well as mutual loyalty, as a matter of course. In the Germanic state, there was no right without a corresponding duty. The individual owed duties particularly to his equal associates, for as a rule it was not the individual who had a sole right but the majority or even the totality of each group. The future generations, the unborn, had equal rights also: gratitude and reverence accorded the ancestors involved care and consideration for those to come show that the chain of members of the clan stretched from the past into the future. The individual possessed rights solely as part of the whole group. This social nature of law, in turn, automatically generated legal concepts which must be described as politico-economic. The farmstead was the economic basis of the kinship group or clan; but it was also the farm that was the legal subject, so to speak. The family law exhibited the cooperative structure of the clan." [Kunssberg, *supra* note 121 at 235.]

[125] Puig Pena, *supra* note 1 at 45. Kunssberg notes that some German legal concepts have been adopted in the law of the Christian Church. "Such institutions as are shown by comparative law to be common to all the Germans are found also in part among the ancient Romans and Greeks as well as among the Celts and the Slavs. It must be concluded, however, that borrowing, dependence or interrelationship is involved in each of these cases. It would be a mistake to look upon Germanic law or the legal concepts common to all the Germans as specifically Germanic. Germanic law has, nevertheless, a characteristic physiognomy of its own." [Kunssberg, *supra* note 121 at 235.]

1. PRE-INVASION GERMANIC LAWS

This saga of the Germanic penal law was typically customary; dominated by the principle of objective responsibility[126] and characterized by the complete affirmation of the individualist principle.[127]

The Germanic laws anterior to the invasion were typically customary. There existed no written laws, but simply customs,[128] and there was lack of certainty and public character of law.[129] The primitive Germanic law included, as its fundamental institutions, the vengeance of blood (*blutrache; venganza de la sangre*; blood feud) and the loss of peace (*friedlosigkeit; perdida de la paz*).[130]

Those acts which offended merely an individual or a family gave rise to a right of vengeance in favor of such victims; but more than a right, it was, in certain cases, an obligation. The offended party and his family sought vengeance from the offender and his family[131] in such manner that

[126] Primitive responsibility was usually of an objective nature; the factor of guilt was not considered. This was also true of the Slavic primitive law. "A master was responsible for his children, his domestics and his animals, and a property owner was responsible even for his possessions; the owner of a pond, for example, was held responsible for homicide if a person drowned therein. As was general in the history of criminal law, this responsibility in the course of time assumed a strictly individual character, and even then only in the case of subjective guilt" [Stanislaw Kutrzeba on *Slavic Law* in 9 ENCYCLOPAEDIA 240-246].

[127] PUIG PENA, *supra* note 1 at 45.

[128] "All Germanic legal records date from the period after their conversion to Christianity; there are only slight vestiges of a heathen, pre-Christian law" [Kunssberg, *supra* note 121 at 235].

[129] PUIG PEÑA, *supra* note 1 at 45.

[130] CUELLO CALON, *supra* note 10 at 71-72.

[131] This was also true of primitive Slavic law which transformed the responsibility of the offender's family in retribution to a formal principle of collective responsibility. "The criminal laws of the individual Slavic nations took over from the original Slavic law and gave still wider application to the principle of collective responsibility in offenses investigated by the state. This responsibility appears as the responsibility of a group of people linked by blood, as in the clan or family, or by territorial propinquity. Clan responsibility was retained longest in Poland; it was abolished by Casimir the Great, but such vestiges as the responsibility of children for the offenses of the father continued until the modern period—in cases of heresy, until the sixteenth century, of treason and *lese majesty*, until 1791" [Kutrzeba, *supra* note 126 at 245].

"The responsibility of territorial groups was characteristic of the medieval period throughout Slavdom. Such a group was constituted either by the *vicinia* (*okolica* in Serbia, *opole* in Poland), which comprised a number of settlements, or the village. The territorial group was materially responsible for an offense such as homicide or theft committed on its territory if the malefactor was unknown, if the inhabitants did not wish to give him up or to punish him, or if the malefactors were not promptly run down. This responsibility had appeared in the Zakonnik Dusana and the Wislica Statutes; in Poland it continued still longer and spread to the towns. In the Polish cities it often took the form of 'representative punishment', as when the city alderman were sentenced to death" [*Id.* at 245-246].

a crime caused a state of war, at times hereditary, among the families.[132] In none of the Germanic sources is there a right of vengeance implanted with a broader extension than that in the "*Gragas*" of Iceland which permitted vengeance for death, injury, seduction of women, and even certain insults. This law determined the areas within which this right could be exercised. In some cases not only the victim and his relatives could exercise it, but also all those strangers who would accompany the offended party.[133]

The principle which dominated all penal construction was the *responsabilidad objetiva* (objective responsibility), by virtue of which penal law was exclusively concerned with the material entity of the injury without making any indication as to the order of culpability. This means that the responsibility arises solely by reason of the result (*erfolgshaftung*) and by its simple material causation (*causalhaftung*).[134]

Within the regime of this objective responsibility, as Casteron puts it, came the first due differentiation to the human progress in making a distinction as to the person of the author — whether he is a member of or an outsider to the tribe. The "*sippe*" constituted the basis of the juridical formation which distinguished between internal penal law and another which is external — whether the "*sippe*" is done inside or outside.[135]

The concept of crime and penalty had geared the primitive Germanic laws to the idea of *paz* (peace). The criminal commits a breach of the peace

[132] CUELLO CALON, *supra* note 10 at 71 *citing* TACITO who, in DE MORIBUS GERMANORUM, cap. 21, described this primitive reaction against crime [n. 14].

[133] CUELLO CALON, *supra* note 10 at 72, *citing* WILDA, DAS STRAFRECHT DER GERMANEM 12. Kunssberg relates: "Germanic criminal law is characterized especially by the clear conception that the legal order is a system of peace. Crime is an act which breaks the peace; hence the natural consequence is the offender's loss of freedom and the cessation of peaceful protection of his person and property. He who breaks the peace is `without peace'; he is abandoned to the feud and the vengeance of the injured party. It follows from the concept of cooperative association, which permeates all of Germanic law, that the clan had to aid the injured party in pursuing the evildoer. Likewise, the offender's clan had to grant him protection unless it cast him out of its ranks. Warfare between the clans was ended by expiation, the payment of a fine and wergild and by solemn proclamation of the new state of peace." [Kunssberg, *supra* note 121 at 237.]

[134] PUIG PENA, *supra* note 1 at 45. Kunssberg, noted that "a long road had to be travelled before the primitive concept of responsibility for external consequences and the sole distinction between deliberate act and an accident — *viliaverk* and *vathaverk* in Old Norse — were further differentiated and the concepts of attempt, complicity, negligence and the like developed. In ancient times, for example, the offenses committed by women or servants were considered unpremeditated accidental actions like anything `caused by a rooster's spur or a dog's tooth'." [Kunssberg, *supra* note 119 at 235.]

[135] PUIG PENA, *supra* note 1 at 46.

(*el delincuente quebrantaba la paz*). In turn, the violation of the peace could be public (*publica*), if it offends the entire community; or private (*privada*), if it offends solely an individual or a family.[136] As a consequence thereof, according to Alimena, one who does not desire peace for the others loses the same for himself (*quien no queria la paz para los demas la perdia para si*). When the violation of the peace is public, it gives rise to what is called loss of peace (*perdida de la paz*), a situation which throws the criminal out of the juridical community in such manner as to lose the protection of its "*sippe*" (outcast or outlaw) and is considered an enemy of his people (*enemigo de su pueblo*), without weapons against wild beasts, which could and should kill him.[137] When the violation of the peace was only private, there existed what was called the blood vengeance (*venganza de la sangre; blutruche*).[138]

The vengeance of blood (blood feud) was limited in time, with the system of settlements (*sistema de las composiciones*). In lieu of the vengeance of blood, the offended pedigree elects the road of settlement or compromise, either by means of contract (*composicion privada*), or by means

[136] Kunssberg notes that unlike Roman or modern law, Germanic law did not distinguish between *jus publicium* and *jus privatum*, "which is so much a matter of course today." [Kunssberg, *supra* note 121 at 236].

[137] Kunssberg relates: "Grave offenses which involved breaking the peace of the whole people made the offender an absolute outlaw. `One without peace' could be hunted and killed like any beast of prey; he was called a `wolf' (*vagr* in Old Norse) and the forest was his refuge. Shameful offenses which provoked the ire of the gods were punished by death; it was proper for offenders in such cases to be sacrificed. The subsequent evolution of criminal law led to modifications of outlawry; an entire system of particular penalties evolved. Furthermore, private criminal law, as manifested in the feud and in vengenace, was displaced and supplanted by public criminal law after centuries of conflict between the two systems." [*Id.*]

[138] PUIG PENA, *supra* note 1 at 46. Cuello Calon, on this same point, explains that the crimes which constituted an offense against the community caused the criminal the loss of peace, a situation which casts him out of the juridical community (as *friedlos*; outcast, outlaw), being left outside of the law in such manner that he who loses peace, loses with it all protection and is considered an enemy of the people. One who loses peace is not only excluded from the human society, but from the juridical community of his people and is left to the beasts in the field and of the forests, and remained at the mercy of all, all of whom have the right and, on occasions, even the obligation to kill him. In Iceland, above all, the persecution of those excluded from the peace (*friedlos*) is executed without mercy; public authority fixes a price (bounty, "man price") for the head of each of those persecuted and those who should kill or deliver any of them obtains the right to collect it. [CUELLO CALON, *supra* note 10 at 70-71, inviting attention to Wilda, *supra* note 130 at 156.]

of a dispute or judicial settlement (*composicion judicial*).[139] In respect of judicial settlement, a distinction was made among three classes of reparations: (1) the *Wergeld*,[140] an amount paid to the victim in the concept of pecuniary reparation (somewhat similar to the modern concept of civil responsibility); (2) the *Busse*, an amount paid in the concept of a penalty (somewhat equivalent to fine); and (3) the *Friedegeld* or *Fredus*, an amount

[139] A roughly identical road was followed under the primitive Slavic laws. Stanislaw Kutrzeba, relates: "In interclan relations among the Slavs, the principle of self-help also dominated. A wrong whether `civil' or `criminal', called for revenge on the part of the person wronged. Retribution was not regulated by the strict principle of *lex talionis*, and the result often led to protracted conflicts. A wrong suffered by one member of a clan was looked upon as an offense against the whole clan, which thus sought revenge not necessarily against the wrongdoer alone but against the clan to which he belonged; other entire clans were exterminated in this manner. Attempts to limit such feuds were the fixing of fines, the restriction of revenge to the guilty person, the introduction of the obligation of warning the offender that vengeance would be sought, the prohibition of vengeance in certain cases, and finally, the encouragement of peaceful settlement and investigation in the courts."

"Instead of retaliation the clan often made an agreement of reconciliation; this was effected by mediators, who set the terms. Reconciliation consisted of `humiliation' and `ransom'. Humiliation was a symbolical execution of retaliation: a person guilty of homicide went barefoot, clad only in a shirt and bearing a sword about his neck, to the nearest relative of the deceased, to whom he handed the sword, which the relative then brandished above the offender's head, thus indicating his right to deprive the guilty man of his life. `Humiliation' evidenced many sacral elements, which may be accounted for by the influence of ecclesiatical law, as is general among all nations where retaliation is practiced. In addition to moral satisfaction, humiliation provided for material satisfaction in the form of articles or money, the amount depending upon the greatness of the inflicted injury; the sum paid in the case of homicide was known as `head payment'. In each particular case the amount was fixed by custom according to social position. In a later period the amount of the head fee was confirmed by registers of the customary law or even by legislation, as in the Statutes of Casimir the Great. Humiliation was abandoned before ransom, which gradually became transformed into the damages of private law." [Kutrzeba, *supra* note 124 at 244-245.]

[140] This is the same *Wergeld* or "man-price" of Anglo-Saxon law, under which, Kirchwey quotes Kemble as having said, "a sum was placed on the life of every freeman according to his rank and a corresponding sum on every wound that could be inflicted on his person, for nearly any injury that could be done to his civil rights, his honor or peace." Kirchwey notes that, as Maine has observed, this is not in the modern sense of the term a true criminal law but a law of delict or tort. "A crime is an act which violates the peace and dignity of the state, which the state punishes for its own protection in the general interest and which accordingly cannot be waived or condoned by the individual who happens to be the sufferer from it or by his immediate kin. A tort is a personal injury with which the state has no further concern than to see to it that the injured party or his kindred received due compensation. This principle of compensation was, in the society out of which it emerged, an essential device to avert the devastating effect of the *lex talionis*. The same end was later more effectually attained by the same development of true criminal law in which the interest of the state in the common security became the dominant, if not the sole factor" [Kirchwey, *supra* note 2 at 570-571.]

paid in addition to the *Wergeld* for the benefit of the community (close to judicial costs).[141]

2. POST-INVASION GERMANIC LAWS

The post-invasion Germanic penal law was dominated by the approximation of the political principle or public concept.[142]

After the invasion, the Germanic penal law assumed the following characteristics:

a. Rise of State Power and Pronounced Emphasis on Juridico-Public Conception

From the establishment of the French monarchy,[143] as a result of which the Germanic tribes were organized as a unitary and stable state with a spatial structure, the power of the state was increased, and the penal law showed a pronounced emphasis on juridico-public conception.[144]

b. Passage of Customary Laws to Legislation

The potent cultural progress, obscured only during the "silent centuries,"[145] occasioned the passage of the customary law to legislation, called popular laws (*derechos populares*),[146] the transcriptions of customs and in-

[141] PUIG PENA, *supra* note 1 at 46; Cuello Calon, on this point, states that the vengeance of blood, resulting from those infractions which injured solely private interests, was limited by settlement (*composicion*) (DEL GIUDICE, DIRITTO GERMANICO, ETC. 441). The sources mention a kind of private settlement which is determined by relatives and friends, and another of judicial settlement (*composiciones judiciales*). Of these, there is need to distinguish between three classes: the *Wergeld*, the *Busse*, and the *Friedegeld*. The authors are not in agreement regarding the signification of the *Wergeld*, but it seems to signify an amount which is paid in the concept of a pecuniary reparation paid by the criminal or by his family to the victim of the crime or to his representative, which came to represent what is actually a civil indemnification for the damages caused by the crime. The *Busse* is understood to refer to the amount paid, in the concept of penalty, to the victim or to his parents, in addition to the *Wergeld*, which is purely a private indemnification (*resarcimiento privado*). The *Friedegeld* (*fredus, fredum*) is an amount which, in addition to the *Welgeld*, is paid to the community [CUELLO CALON, *supra* note 10 at 71-72, *citing* Wilda, *supra* note 130 at 224.]

[142] PUIG PENA, *supra* note 1 at 46.

[143] Merovingian dynasty, from Clovis (Chlodovech) [481-751]; Caroligian [751-843 (Charles the Great [Charlemagne (742-814), last major domus of the Merovingian regime and first king of the Caroligian line]), 768-814], 911, respectively.

[144] PUIG PENA, *supra* note 1 at 46.

[145] 11th and 12th Century A.D.

[146] Also called *leges barbarorum* (*lex ripuaria*, 7th century; *lex alamannorum*, 8th century; *lex baiuvariorum*, 8th century; *lex frisionorum*, of Charles the Great; *lex saxonum*, of the Saxons; *edictus rothari*, etc.).

dependent juridical precepts, and the enactment of the Laws of the King (*Derecho del Rey*), which were particularly interesting capitulation agreements during the Carolingian epoch.[147]

c. Gradual Disappearance of Arbitrary Laws

It affirmed and tended to circumscribe the Faida, giving obligatory tone to the concession of peace (primarily in private capacity), under conditions provided by an order in such manner that one who does not comply with it may be punished.[148]

As against the *Derecho de Faida* and beyond, it operated as well the so-called *paces territoriales*. Gradually, the arbitrary laws disappeared and, during the final stages of the lower Middle Ages, the so-called eternal territorial peace (*Paz territorial eterna*) was enacted in Worms (1495). This meant the perpetual prohibition of the *Law of Faida*.[149]

d. Appreciation of the Intentional Factor

The intentional factor successfully gained ground in the appreciation of crimes, acquiring some looseness in the circle of crimes in the attempted stage, and in those of antijuridical acts which presuppose the intention as a conceptual element. In the judicial actuations, its influence was felt in fortifying the public authority by the limitation of self-help (*autoayuda*; diminution of the right of vengeance), and the transformation of judicial proceedings on the basis of the Christianization of the procedural formalities (the introduction of adjudication and the expansion of judicial authority) and the reform of the probative proceedings.[150]

B. Canon Penal Law

The Canon law is characterized by the accentuation of the subjective principle and the initiation of the benign orientation.[151]

It is not possible, however, to speak of the influence of the doctrine of the Church on penal law during the horrible times of the persecution.

[147] PUIG PENA, *supra* note 1 at 47.

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

Even at the time when Christianity was sitting on the throne of the Ceasars with Constantine, little may be said of the influence of the Canonical doctrines, which fell under the Roman influence instead of influencing the latter. For that reason, in this brief historical description of the penal law, the Canon law should be situated at the inception of the Middle Ages.[152]

At the beginning of the Middle Ages, it is certain that the Church succumb to certain barbaric influences. It is true that the Canon penal law has been occasionally inspired by the vindictive sentiment, that at times its penalties were rude and severe. But this should not confuse the concept of the penalty, as has been determined by the dictates of the Church with the spirit of the religion, with that of its organization in the Canon law.[153] If the purpose were to determine the influence of the Church on the actual juridical penalty, there is need to consider the Canon law for two reasons: because those who elaborated its doctrines and its laws have not been able to liberate the juridical apparatus from the extrinsic element of the Christian spirit and of the animating thought of the Church; and because all Canon law on the organization of the penalty, as well as on its other institutions, could not be liberated from the influence of the temporal institutions.[154]

The principles of the Church molded its system — ideas of charity, fraternity, redemption — which heavily influenced the general development of punitive legislation.[155] According to Cuello Calon, the penal law of the Church, representing the first stage in the humanization of the penalties in the age of extreme harshness, were inspired by the ideas of charity and compassion for those who have fallen, creating a benign and moderate penal system pursuing the correction and redemption of the offender.[156] Its penitentiary system, organized with reformatory ends, has anticipated the appearance of correctionalist ideas and institutions which have only been embodied in the laws and penitentiary practice in the recent past.[157]

[152] *Id.* at 48.

[153] CUELLO CALON, *supra* note 10 at 74.

[154] *Id.*

[155] PUIG PENA, *supra* note 10 at 48.

[156] Cuello Calon asserts that the Church tried not to aggravate the penalties corresponding to crimes, to administer but not to abate the spirit of the offender and to comfort him with the hope of forgiveness and with the start of a new life. [CUELLO CALON, *supra* note 10 at 72, *citing* Shiappoli, *Diritto penale canonico in* 1 THE ENCYCLOPEDIA OF PESSINA 619.]

[157] *Id.*

Before everything was established, a dam was set up — the more forceful maybe, according to Puig Pena[158] — against the barbarism at that time, with the *Treguas de Dios* and the so-called *Derecho de Asilo*, by virtue of which, the Church withdrew many criminals from the vengeance of individuals and put the right to punish in the hands of public authority.[159] It further attacked the *Ordalias* and the *Duelo Judiciario* and, in the name of human fraternity, it proclaimed peace among men.[160]

Lastly, in terms of the application of the penalties, it primarily individualized penal treatment, seeking to reach more deeply into the spirit of the offender in order to cause his correction. It is certain that the penalty was considered by Christianity as an atonement (*expiacion*), but different from the classic expiation. In effect, it was not solely conceived as a sacrifice and physical suffering, but as redemption, like the spiritual experience of penitence (*penitencia*). It is necessary that the offender be convinced of the evil of what he has committed and that he repent. It should,

[158] *Id.* at 48.

[159] Cuello Calon asserts that the Canon law resisted private vengeance, invigorated the administration of public justice and proclaimed that the persecution of crime is the right of the prince and of the magistrate, and recounts a passage from Shiappoli that Christianity drew the sword of justice against offended parties desirous of vengeance and placed it in the hands of the authoritative ministers of the Lord; Christianity imposed obedience to the constituted authority, without which society would not have lasted and would have stayed in continuous danger; for that reason, the holy Fathers have proclaimed in a special manner that to repress the crime is the work of the prince and of the magistrate, that the punitive authority does not pertain to particular individuals, and whoever shall kill a criminal without being vested with public function, commits the crime of homicide. [CUELLO CALLON, *supra* note 10 at 72-73, n. 24, *citing* Schiappoli, *Diritto penale canonico*, in 1 THE ENCYCLOPEDIA OF PESSINA 621].

[160] PUIG PENA, *supra* note 1 at 48.

as well, provide whatever means which would contribute in making him realize his evil deed and to repent.[161]

The Canon law gave an extraordinary contribution to the development of penal law based on the determination of the penal measure upon the criminal intent (*intencion criminosa*)[162] and not upon the objective entity of the crime.[163] The penal law of the Church and the Canon law introduced into the penal conceptions of those times the profound spiritualist sentiment. It endowed the concepts of imputability of crime and of penalty with considerable subjective value, giving birth to new ideas regarding responsibility (responsibility founded in psychical causality), and thus creating the criterion of moral responsibility.[164]

[161] *Id.* Cuello Calon explains that, although recognizing the benign and human spirit and the reformatory orientation of the Canon law, it has been affirmed that within its system the penalty always had a vindictive sentiment, that it remained a retribution, the exercise of divine or public vengeance with a triple purpose pursuing the repentance of the offender, his intimidation, and the expiation of the crime committed; he cites Shiappoli who affirms that according to the words of St. Peter, the right to punish is the *vindicta malefactorum* (retribution for wrongdoing), the punishment of the culpable; finally, he notes that the ecclesiastic tribunals did not apply the penalty of death, and those who ought to suffer this penalty were delivered to the lay tribunals (a relaxation of the secular arm), which applied the penalty of death.

"The canon law, according to Fr. Montes [MONTES, EL CRIMEN DE HERIJIA, 332 (1918)], has not established the capital penalty for any crime"; and it is added (note 2): "[t]his does not mean that the penalty of death established by civil laws against heretics was against the will of the Church." On the contrary, those laws were expressly authorized and commanded to be observed, especially from the time Innocent IV (1254) accepted and imposed as applicable norms the Constitutions of Frederick II. In respect of the "relaxation of the secular arm," it is affirmed by Fr. Montes (at 331) that the ecclesiastical judges who delivered the criminal to the civil authority, did not ask for the death of the heretic nor declared in any manner that the offender deserved death, and if the secular authority should refuse to condemn him with said penalty, the ecclesiastical judges did not obligate the civil judges to do so, nor sought nor counseled that such favor be given, but on the contrary, they pleaded with the secular authority that the offender not be punished with the penalty of death nor with any other involving a drop of blood. However, he adds, they could have indirectly moved the civil judges to execute the penalty of death, obligating the latter to comply with the laws and threatening them with censure should they not do so, as having favored the heretics (MONTES, at 334, n. 1). Regarding this same material and with a different criterion READ, 1 HISTOIRE DE L'INQUISITION AU MOYEN AGE 691; KHAN, ETUDE SUR LE DELIT ET LA PEINE EN DROIT CANON 34 (1898). The canon law, it is added, proscribes private vengeance and legitimizes that of the public in the name of justice, the canonical texts opposing the *vindicta zelo* or *bono animo* with the *vindicta amore ipsius vindictae*. So, in the canon penal law the germ of diverse theories has planted its construction in order to justify the foundation of the right to punish. [CUELLO CALON, *supra* note 10 at 73-74, n. 29.]

[162] PUIG PENA, *supra* note 1 at 48-49. From another perspective, it is said that "in mature criminal law, intent to commit the criminal act, *mens rea*, is an essential element in guilt. This is, however, totally lacking in the conception of crime in the early law. In the blood feud, it is not to be expected that the avenger will pause to determine whether the homicide was premeditated. Thus, too, the compensation was payable whether the deed was willful or accidental" [Kirchwey, *supra* note 2 at 571].

[163] PUIG PENA, *supra* note 1 at 48-49, with note 19.

[164] CUELLO CALON, *supra* note 10 at 72.

The Canon law influenced all legislations by its character of universality.[165] The principal sources of the Canonical penal law were the *Libros penitenciales*, instructions given to confessors to administer the sacrament of penitence and those which have been included in the penitencies that ought to be imposed for diverse crimes and sins.[166] In addition to these, there were the *Ordinanzas eclesiasticas*, the *Capitulares carolingias* and the *Sinodos*, the *Capitula Episcoporum* of that era, as well as the *Ordinanzas* enacted to ensure the *Paz de Dios*, the individual *Concilios*, and the *Sinodos papales*. Also sources of the Canonical penal law were the Roman penal law as well as the diverse secular legislation, from which it frequently obtained the concept of crime and even its penalties. This law reached its complete development at the end of 14th century when the official collection of the *Decretales ponteficias* was terminated and recompiled in the *Corpus juris canonici*. This comprehended the *Decretum* of Gratian,[167] which contained penal dispositions but were disseminated without any order, the *Decretales* of Gregory IX, and those of Boniface VIII and the *Clementinas*, the *Extravagantes* of John XXII, and the *Extravagantes comunes*.[168] The Code of the Canon Law published by Pius IX contained a part that is penal.[169]

The canonical legislation divides crimes into three: (1) *delicta ecclesiatica*, which were the crimes against the Catholic faith, and whose repression fell within the competence of ecclesiastical tribunals; (2) *delicta secularia*, whose repression was solely the interest of the civil society and which were within the competence of the secular jurisdiction; and (3) *delicta mixta sive mixta fori*, which offended both the civil and the religious order.[170]

[165] PUIG PENA, *supra* note 10 at 49.

[166] CUELLO CALON, *supra* note 10 at 74-75, n.33; *citing* MANZINI, I LIBRI PENITENZIALI E U DIRITTO MEDIOVALE (1926).

[167] Italian canonist of the 12th century; composed his *Concordia discordantium canonum* at about 1140, which later became known as *Decretum*; assembling close to 3,500 texts — canons of the councils, decretals, Roman laws, extracts from the church fathers and the like — bringing together the materials from existing collections which circulated in the west after the Gregorian reform, such as those of Anselm of Lucca, Yves of Chartres and Alger of Liege. The *Decretum* never had more than a private character but was treated as of the greatest authority by the popes and ecclesiatical courts and since the 12th century has formed the basis of instructions in the canon law. It formed the first part of *Corpus juris canonici*, and the *Codex* which replaced the *Corpus* in 1917 borrowed from its many rules. Theology and morals still held a great place in the *Decretum*, but little attention is paid to speculation. Gratian applied a juridical method to the texts which cointained the actual disciplinary rules; and thus contributed to the creation of an autonomous science of canon law, which was later on taught in accordance with the *Decretum*, side by side with theology. The *Decretum*, as a result, had a great influence upon the political and social doctrine and has provided some of the foundations of contemporary Christian society. Its theory and practice of religious organizations and many of its views on the state, the relation between church and state, the theory of war, the rights of property and contract and the law of civil and criminal procedure were based in large part on the text of the *Decretum* [Gabriel Le Bras, *Gratian*, in 7 ENCYCLOPAEDIA 156].

[168] CUELLO CALON, *supra* note 10 at 74-75, inviting attention to Schiappoli, *supra* note 156 at 638.

[169] *Id.*, inviting attention to FRANK, UBER DAS STRAFRECHTS DES CODEX JURIS CANONICI IN MUNCHENER FESTGABE FUR KARL VON BIRKMEYER 1 (1917); AMOR RUIBAL, DERECHO PENAL DE LA IGLESIA CATOLICA SEGUN EL CODIGO CANONICO VIGENTE (1919-1924).

C. *Local Laws: The Confusion of Elements*

The Roman, the Germanic, and the Canon penal laws constituted the basis of the European penal legislations during the descent of the Middle Ages.[171] In some countries, the Roman law predominated, in others the Germanic, but in all parts there is a mixture among them, changing and transforming without end, giving this epoch, as one of its principal characteristics, a lack of consistency and stability.[172]

At this time there was a fusion of diverse elements in the so-called local laws,[173] consisting of the numerous municipal statutes (*estatutos municipules*) in the Northern Italy and in the *Constitutiones Regni Siculi* in Southern Italy, prior to the 13th Century, initiated by the Norman Count Roger II of Sicily, and thereafter completed by Frederick II. In Germany, after the famous *Constitucion de Maguncia* of Frederick II, there followed an extraordinarily chaotic period, from which came out only the Mirror of Sajonia (*Espejo de Sajonia; Sachsenspiegel*), that of Suavia (*Espejo de Suavia; Schwabenspiegel*), and the *Ordinanza de Bamberg* of 1507.[174] At the close of the cycle was the *Constitutio criminalis*, called *La Carolina*, promulgated by Charles V, which recognized the traditions of the Roman and Canon laws, to the point of making the same the foundation of the common penal law of Germany until the Codification. In France, the Statutes of St. Louis, the "*Gran Coustumier*" of Charles the VI (1453), and the different *ordinanzas reales*[175] were the body of legal rules that were more salient. In Belgium, there were the "*Coustumes*" of the different regions, the "*Placaerten*" and the national "*Ordonnantien*," as well as the ordinances dictated by Philip II. In Denmark, the "*Lex Regia*" appeared in 1660 with unheard of severity, which was thereafter substituted by another body of laws ("*Danske-*

[170] *Id.*

[171] *Id.*; PUIG PENA, *supra* note 1 at 49, n. 19.

[172] CUELLO CALON, *supra* note 10 at 75.

[173] PUIG PENA, *supra* note 1 at 49.

[174] *Id.*, which differs from the date cited in CUELLO CALON, *supra* note 10 at 75.

[175] CUELLO CALON, *supra* note 10 at 75.

low"). In Sweden, a general Code which became the foundation of its penal law took effect in 1734. In Russia, there was the "*Prawda Russkaia,*" an antiquated compilation of the 12th century which was both hard and cruel, and which was followed by other compilations ("*Soubdenik,*" elaborated in 1497 and "*Uloshenie,*" in 1649).[176] In England, there appeared the statutes of the various Kings, which brought together its customary laws, constituting the sources of its penal law.[177]

In some countries, the Roman influence predominated, especially in Italy and in France. In Germany, the Germanic influence was more vigorous. However, the "*Constitutio criminalis Carolina,*" which became the basis of the German common penal law until the 19th century, was infiltrated by the Roman and Canonical influences, although the Germanic influence was more enduring in those Scandinavian countries which for many centuries have remained outside of the influence of the Roman law. Likewise, the English law has stayed for a long time outside of this influence.[178]

As a general rule, these local laws retained the characteristics of the Middle Ages and, for a great part, of the Modern, which rendered the penal law unequal and uncertain by reason of the unrestrained exercise of judicial discretion. The penalties were extremely cruel and the individual guaranties were sacrificed under the necessity of maintaining social order. All statutes and local laws were dominated by the principle of the rigorous protection of the juridical order as a counterforce to the tremendous disequilibrium of the age.[179]

Speaking of the same era and of the rise to the highest dominance of the principle of public vengeance (*la venganza publico*), Cuello Calon explains that the penal repression sought to maintain, at all cost, the public tranquility, an end which the state intended to pursue by means of terror and intimidation through the frequent execution of the penalty. This was the period when there appeared very severe and cruel laws employed to punish with great harshness, not only for grave crimes, but even for acts about which, at present times, the state would be indifferent. Some examples are the crimes of *magia* and *hechiceria*, which were adjudicated by

[176] *Id.*

[177] PUIG PENA, *supra* note 1 at 49; CUELLO CALON, *supra* note 10 at 76.

[178] CUELLO CALON, *supra* note 10 at 76.

[179] PUIG PENA, *supra* note 1 at 49.

special tribunals with more inhuman rigor.[180] In order to fight against criminality, it was characteristic of those times that the social authority did not hesitate to apply the more cruel penalties: the death penalty being accompanied by aggravated forms of execution;[181] the corporal punishments consisting of terrible mutilations; of infamy; and the pecuniary impositions in the form of confiscation. The penalty for certain crimes was applied to the descendants of the accused and lasted a certain number of generations, thereby setting them out as a separate caste deprived of the protection of the laws. Even the peace of those who have fallen were not respected because cadavers were disinterred and subjected to trial. There reigned in the administration of justice an irritating inequality, such that while the nobles and the powerful were imposed more benign penalties and were the object of more effective penal protection, to the plebeians and the serfs were reserved the more severe penalties and their protection was, in most cases, but a caricature of justice.

Lastly, there dominated a more complete arbitrariness, with the judges and tribunals possessing the power to impose penalties not provided by law, to incriminate for acts that have not been penalized as crimes, and to abuse this power to its utmost excesses. Those judges and tribunals did not serve the cause of justice, but that of despots and tyrants who were the keepers of authority and of command. It was this spirit that prevailed upon the European penal law until the advent of the 19th century.[182]

III. MODERN TIMES

Modern penal law, prevalently dominated by science, was initiated by the works of the so-called glossators (*glosatores*), also called practicals (*practicos*) and interpreters (*interpretes*). During these times, the Roman law persistently acquired greater predominance, and in all places where it

[180] CUELLO CALON, *supra* note 10 at 58, note 6, observes that persecutions constituted one of the more bloody episodes of the European penal law, especially during the 15th to 17th centuries. For the use of these special tribunals, he adds, there were specially written books, the more famous of which was the "Scourge of the Witches (*Martillo de las Brujas*)" of *Sprenger e Institoris* (*Maleus Maleficarum*, Spira, 1491) published in Germany, or that of Martin del Rio (*Disquisitiorum magicarum libri sex, Maguncia*, 1593) which has received great reknown as a manual of proceedings for the use of the judges in causes involving *hicheceria*. Regarding this material, SOLDAN-HEPPE, GESCHICHTE DER HEXENPROZESSE (1938); S.A. NULLI, I PROCESSI DELLE STRAGHE (1939); S. CIRAC. ESTOPANAN, LOS PROCESOS HECHICERIAS EN LA INQUISITION DE CASTILLA LA NUEVA (1942).

[181] The horrifying examples, cited by Cuello Calon, of these barbarious proceedings were the execution of Juan de Canames who sought to assasinate Ferdinand the Catholic in Barcelona in the year 1758; and those of the Damiens in Paris of 1757 [*Id.*].

[182] *Id.*

was the source, judges liberally followed it as the basis of their decisions, especially the Digests and the Code of Justinian. Gradually, there arose a common penal law which was determined by jurisprudence.[183] In addition, the Roman law influenced the formation of the other elements, principally the Canon and the customary laws.[184] This development gave rise to a common law that existed in France, in Italy, in Germany, and in various other European countries.

A. European Common Penal Law: Adherents of the Practical

During the period of the proliferation of various local legislations, the Justinian Roman law, on the one side, has been constantly made more effective and, on the other side, the Canon law has been spread over an extraordinarily broad area. But a new element came to prepare the fusion of the various legislative sources, and this was practical jurisprudence (*jurisprudencia practica*). The European common penal law, which emerged in the process, has gained numerous expositions in the works of a number of jurists, called the glossators or *practicos* because of the eminently practical orientation which they gave their works. In their works, one would find the principles and norms which have been applied by the tribunals, guided principally by the Roman law. The authority of these jurists has made certain the source of the law, and in their works — of pure exegesis and practical norms — all of the penal science of the times have been summarized.

[183] H.D. Hazeltine, in his work on the Glossators, maintains that the cultural prestige of the Bolognese glossators influenced the judges and legislators of European communities; and, in fact, it was the civilian glossators (as distinguished from canonists glassators) who were glossing ecclesiastical texts based partly on Roman legal conceptions, who set in motion that extensive reception of Roman and Canon law which so largely colors the legal history of Europe during the later Middle Ages. The revival of the study of Roman law by the glossators of the 12th and 13th centuries not only openly inspired the reception in Europe as a whole but gave to many legal systems long before the close of the Medieval era marked and permanent Romanic character. The glossators were, he concludes, a vital force not alone in their own time but also, through the widespread influence of their writings, in the ages that followed [H.D. Hazeltine, *Glossators*, in 6 ENCYCLOPAEDIA 679-682].

[184] The Roman law had an element of appeal, says Leopold Wenger, "which must be attributed to the practical intelligence, sober-mindedness, and objectivity displayed by the Roman jurists, through numerous *responsa* of the *Digesta* and the *rescripta* of the *Codex*, in balancing interests against interests in their private law. This fact is essential for an understanding of the dominance of the Roman law in legal and political life since the Middle Ages." [Wenger, *supra* note 88 at 206]

The School of Bologna, however, as the glossators were referred to by Pessina, was not the only initiator of the scientific movement.[185] But the scientific movement in the field of law gained its efficacy from the practical life of the law, to which the *glosatores* have devoted themselves, toward the application of laws to real life cases. When more profound studies came about, their exegesis reached the center of the other juridical knowledge. And so, the jurisconsults acquired the name of *interpretes* who, in turn, were divided into *civilisti, canonisti,* and *Doctores utriusque juris.* Thus, they became legislative authorities and the fragments of their interpretations, regarding the Roman law and the Canon law or regarding the laws and customs of the forum, were elevated to sentences of absolution or of conviction. Even the very *usus fori,* like *autocritas rerum perpetuo similiter judicatorum,* was elevated to the category of a law when many writings were dedicated to the collection of decisions that the judges have rendered in order to find norms in the manner of their judgment.[186]

In later times, the more celebrated practicals in Italy were Julio Farinaccio Claro; in France, Ayraut; in Germany, Carpzovius; in Belgium, Damhouder.[187]

The principle which dominated the European common penal law from the Modern Age up to the Codification is, until later, a vigorous repulsion of the individualism which had produced social disorder and anarchy during the Middle Ages, regarding as legitimate all that which have

[185] "The *Encyclopedistes*, with their first attempt at a positive synthesis of human knowledge, without demanding a revolution and, probably, without even wishing to imply it, had contributed to the self-consciousness of the *bourgeois* class, which was destined to accomplish the revolution. The practical reforms which the *Encyclopedistes* proposed as potentially realizable within the framework of the *ancien regime* — definition of the constitution, guaranty of individual liberty, state protection of science and industry, improvement of administration and in particular of the fiscal system — became the program of the Constituent Assembly of 1787." In conception, plan and execution, the work of the *Encyclopedistes*, the *Encyclopedie*, says Hubert, "represents the projection of the idea current in the eighteenth century that the progress of mankind can be achieved through the diffusion of knowledge and of reason. It is the typical as well as the consummate expression attained in France by the Enlightenment. A mighty instrument in the molding of eighteenth century French opinion, a force incorporating and unifying the scattered forces of the *philosophes*, the *Encyclopedie* also has paramount significance from the purely scientific point of view x x x. It bestowed upon the social sciences the objective and experimental spirit of the physical sciences and prepared the materials for future research and thought." [Rene Hubert, *Encyclopedistes*, in 5 ENCYCLOPAEDIA 527-531]

[186] CUELLO CALON, *supra* note 10 at 76, at note 34; *citing* ELEMENTOS DE DERECHO PENAL 133.

[187] *Id.*; *citing* 2 CALISSE, SVOLGIMENTO STORICO DEL DIRITTO PENALE IN ITALIA DALLE INVASIONE BARBARICHE ALLE RIFORME DEL SECOLO XVIII IN ENCYCLOPEDIA OF PESSINA 17; 1 VON HIPPEL, DEUTSCHES STRAFRECHT 228; ALARD, HISTOIRE DE LA JUSTICE CRIMINELLE AU SEIZIEME SIECLE, GANTE-PARIS 426 (1868).

been committed against those who disturbed public tranquility. But precisely because of that, it fell into the abject situation in which horror came to dominate all aspects of the punitive law.[188]

In terms of the penal law, it was unequal, uncertain, contradictory. In terms of the crime, it was not viewed from the perspective of individual justice but from that of the interest of the state (for which the severest punishment and of broadest application were the laws of *de maiestate*). In terms of the penalties, the more tremendous atrocities constituted its modality. In terms of the proceedings which predominated in the whole of Europe, the Inquisition, with its secret investigations, was written without the guaranty of a defense. As pointed out by Pessina, however, through all these baneful manifestations obtaining in the penal law at that time, something good and useful obtained which was meant to subsist in order to unify the penal reform: that the state should prosecute the violation of the law committed by an individual. From this arose three institutions: (1) the *accion publica*, or that the prosecution of crimes pertains *ex officio* to the power of the state, to be exercised in the name of all; (2) the permanent judges or interpreters of the penal law, invested by the state with the power to adjudicate; and (3) the written and secret instructions of the evidence as a necessary preparation for the judgment. Each of these elements, which have subsisted with the limitations imposed by the subsequent ages, had certainly given origin to the gravest evils but animated by the new political doctrines which came with the progress of civilization, had produced salutary results and has satisfied the more just exigencies.[189]

B. Penal Law of the "Old Regime"

The common penal law and the institutions that emerged during the early part of the modern times until the French revolution, was denominated in France as the penal law of the ancient regime *(antiguo regimen)*,[190] whose severity the people's revolution sought to mitigate. This is to be distinguished from the penal law that arose during the scientific period, and which prevailed over all of Europe in the 16th century until the Codification.[191]

[188] PUIG PENA, *supra* note 1 at 50.

[189] *Id.*

[190] The term *ancien regime* was used by the French revolutionists to refer to the institutions against which the revolution was directed. In this context, in its broad sense but as applied to the institution of the penal law, the term is used to refer to pre-revolutionary regime of penal laws.

[191] PUIG PENA, *supra* note 1 at 53.

C. Age of Enlightenment: Illuminismo *and* Encyclopaedismo

The modern phase of the penal law was initiated with the humanitarian period of the Enlightenment[192] in Germany and the Encyclopaedism in France. The Illuminism or enlightenment was the historical period of profound transformation of ideas. During that time, there existed, as Mezger states, a new direction in the mode of thinking of man. Man and his capacity to think were liberated. As a consequence of the great discoveries in the natural sciences (Copernicus, Kepler, Galileo, Newton, etc.), the human spirit has learned to march solely along his own road. Hugo Grotius[193] placed the bases of natural law and founded the penalty on considerations of reason. Samuel Pufendorf openly displaced the retributionist idea, and Thomacius defended the rationalism of state policy which was thereafter elevated by Christian Wolff into a comprehensive system.[194]

In the subsequent evolution, France marched at the forefront. Montesquieu[195] reclaimed the independence of judicial power, liberty and

[192] "Enlightenment" is the liberation of man from his self-caused state of minority, which is the incapacity of using one's understanding without the direction of another. This state of minority is self-caused when its source lies not in a lack of understanding but in a lack of determination and courage to use it without the assistance of another. *Sapere aude!* "Dare to use your own understanding!" was the motto of the Enlightenment [Robert S. Smith, *Enlightenment*, in 5 ENCYCLOPAEDIA 547-553].

[193] Huigh de Groot (1583-1645), Dutch jurist; lawyer at the age of 15; became involved in the fervent controversies between the Calvinists and non-Calvinists and, after Maurice of Orange's *coup d'etat* of 1618, was imprisoned for life, but escaped to France, where he wrote *De jure belli ac pacis*, a systematic treatise on the whole of positive law which governs mankind and its political organizations excepting national or municipal law (revised and enlarged, with 2nd edition published in Amsterdam in 1631). Among the four main characteristics of his book, Grotius based the binding force of his imposing system on a theory of natural law which has been upheld for nearly two centuries [Cornelius Van Vollenhoven, *Hugo Grotius*, in 7 ENCYCLOPAEDIA 177-178].

[194] The "Enlightenment" rejected any purely theoretical theory of the state; its postulates are those of "natural reason," (*interpretatio naturae* of Lord Francis Bacon). Johannes Althusius, in his *Politica methodice digesta* (1603), although expressive of strong religious conviction, "refused to seek the foundation of political theory in religion or believe in revelation, and deduced by a strictly rational procedure a purely secular conception of society. In Germany, Pufendorf and Wolff were the followers of Althusius" [Smith, *supra* note 192 at 547].

[195] Baron de la Brede et de Montesquieu, Charles de Secondat (1689-1755), French political theorist. His work reflected the transition from the rigidity of French classical thought to the new currents of English philosophy and natural science. "When it became apparent, in France as well as in America, that the phraseology of natural rights was opening the door to less responsible elements in the population, the doctrine of balance of power, as abstracted from Montesquieu by Blackstone and Dellolme, recommended itself as at least one means of insurance against domination by a mass controlled legislature" [Peter Richard Rohden, *Montesquieu, Baron de la Brede et de* in 9 ENCYCLOPAEDIA 639].

equality. Voltaire[196] insistently demanded reform of judicial administration and the old edifice of the punitive law crumbled gradually.[197]

D. Humanitarian and Individualist Penal Law

The Church brought about the first movement against the crudest penalties of the ancient times.[198] However, as regards the influences actuated with this humanitarian end and which were closest to those of the present times, these should be found in those ideas dominating the world of the thinkers at the close of the 18th century, to which has been given the name "Enlightenment."[199] Under this influence was born a new epoch for the penal law: the humanitarian period. The way toward this development was prepared by the works of Montesquieu, D'Alambert, Voltaire

[196] Francois-Marie Arquet de Voltaire (1694-1778), French philosopher. In 1761 the Parliament of Tolouse, swayed by the religious passions of the community, condemned the Huguenot Jean Calas to torture and death for the alleged murder of his son and deprived his family of their property and civil rights. "Convinced that Calas was innocent, Voltaire employed all his talent, influence and furious zeal to make the *Affaire Calas* a European *cause celebre* and after three years of unremitting effort obtained a reversal of the verdict and a restoration of rights and property (1762-65). The French were quick to see a dramatic fitness in Voltaire's championship of the Calas family, since their sufferings flagrantly exemplified the evils of religious intolerance, the stupidity of mass emotion and the barbarous inhumanity of the prevailing legal procedure — the very foundations which Voltaire had denounced in his writings, the essence of that `Infamous Thing' which he had insisted must be `crushed'" [Carl Becker, *Francois-Marie Arquet de Voltaire*, in 15 ENCYCLOPAEDIA 281-283].

[197] PUIG PENA, *supra* note 1 at 52.

[198] CUELLO CALON, *supra* note 10 at 59; *see* Chapters V and VI of his work; *citing* VIDAL-MAGNOL, COURS DE DROIT CRIMINEL ET DE SCIENCE PENITENTIARE 18 (9th ed.); SELEILES, L'INDIVIDUALIZACION DE LA PEINE 37 (2nd ed., 1909); P. MONTES, DERECHO PENAL DE HEREJIA, MADRID (1919); B. GUTIERREZ, EXAMEN HISTORICO DEL DERECHO PENAL 82 (1866).

[199] *Id.*; Cuello Calon explains that the partial precursors of this movement were Hobbes (1588-1679), Pufendorf, professor in Heidelberg (1632-1694), Wolff, professor in Halle (1679-1754), all of whom have founded the penalty on intimidation. [Cuello Calon, *supra* note 10 at 59.]

and Rousseau, but was only realized by the professor from Milan, Cesare Beccaria.[200]

Parallel to the movement in Italy initiated by Beccaria, there arose another in England by the works of Howard, of great transcendence as well. But its sphere of action was not as extensive because it was only limited to the field of prison penalties (*penas carcelarias*).[201]

An attack of profound transcendence came to favor the movement, accentuating all of the individualistic character of the penal law with the French revolution. This gained a good number of adherents among Italian reformists with their Declaration of the Rights of Man and in their penal codes, the Codes of 1791 and of 1795. The individualistic postulate likewise influenced the Code of 1810, which contributed a lot in the formation of a European penal law with a new character.[202]

[200] (1738-94?), Italian economist and jurist; appointed professor of public law and economy in Milan in 1768; his opinions were formed by study of the French encyclopedists and of the French scholar Montesquieu, and his chief work was the *Trattato dei Delitte e delle pene* ("Treatise on Crimes and Punishment"), first published anonymously at Monaco in 1764, which became extremely popular, and was translated into all European languages. The writings of Beccaria are acknowledged to have been partially responsible for the subsequent reforms of the penal codes of European nations. He was among the first to advocate education as a means of lessening crime. In his famous book, he reviewed the reigning penal law, fought against the penalty of death, the penalty of infamy, torture, the *talla*, the inquisitive proceedings, and has ardently advocated the attenuation of penalty, the legality of the penalties, the protection of the accused through procedural guarantees. Its echo has been great that it created a favorable environment for the humanization of the criminal legislation, and some monarchs were moved by its influence that there were introduced a series of reforms in the penal laws of their respective peoples (Catherine II of Russia, Joseph II of Austria, Frederick of Prussia) [VON HIPPEL, *supra* note 187 at 272, maintains that the penal reform in Germany should be attributed to Frederick the Great of Prussia and not to the influences of the French philosophers. Of the same view was K. MEHRING, INWIEWEIT IST PRAKTISCHER EINFLUSS MONTESQUIEUS UND VOLTAIERES AUF DIE STRAFRECHTLICHE TAETIGKEIT FRIEDRICH DES GROSSEN ANZUNEHMEN BZW. NACHZUWEISEN (1927); *cited* by CUELLO CALON, *supra* note 10 at 59-60, n. 12].

[201] This philanthropist, in his numerous visits to prisons in almost all European countries, had occasion to appreciate the horrible conditions which has been brought upon those therein detained, in infected prisons, without light, without air, without material nor moral assistance. The contemplation of these horrors moved him to the publication of his book, in which he laid down a complete system for the treatment of prisoners, systems based on the moral reform of the convict by means of religion, by means of work, by their individual separation and by means of a hygienic regimen and humane treatment. This book had great resonance, not only in England, but also in the entire continent, and has spread to many countries and prepared the stage for a great penitentiary reform, which did not take much time to be implemented [*Id.* at 60-61].

[202] CUELLO CALON, *supra* note 10 at 77.

1. BECCARIA'S WORK

From Italy, as the final part of the penal evolution, a strong impulse of reform was given by the father of this science, Beccaria. In his famous work *Trattato dei Delitti e delle pene*, he thrust a tremendous reproach against the abuses of the criminal practice then obtaining.

Beccaria's tiny book produced an enormous effect on the world, and it was the Illuminist Frederick the Great of Prussia[203] who suppressed all torture. With the influence of the work of Beccaria, there were many other monarchs of elitist despotism who sought to introduce in their laws the movement of reform. Leopold of Tuscany[204] abrogated the penalty of death; Joseph II of Austria made it applicable solely to military crimes;[205] Charles III of Spain sought to reform the Spanish penal laws; and Catherine II of Russia[206] gave a commission tasked with modifying Russian law some instructions in which were literally transcribed pages from Beccaria.[207]

[203] Responsible for making Prussia one of the great powers of Europe and the rival of Austria for the control of Germany (1712-86); friend of Voltaire; wrote the *Anti-Machiavel* (Copenhagen: 1740), an indignant rebuttal of Machiavelli's *Prince*, although he accepted the heart of Machiavelli's doctrine, as his guiding political principle throughout his reign, on mounting the throne in 1740. "On the humanitarian motif, which was inseparable from the movement of Enlightenment whose cause won him, he abolished torture in all but a few cases, such as treason, and proclaimed in 1740 unconditional religious toleration" [Ferdinand Schevill, *Frederick II* in 6 ENCYCLOPAEDIA 431-432].

[204] (1747-1792) Succeeded to the title of Grand Duke of Tuscany in 1765, after the death of his father; and suceeded his brother in 1790 as Holy Roman Emperor from 1790 to 1792.

[205] (1741-90); described as having represented the purest type of enlightened despot; he sought to put into practice the new concept of state which he learned from the example of Frederick the Great, from Voltaire and from the French *encyclopedistes* and physiocrats. "He did away with torture and trials for witchcraft, punished dueling and exercised a very tolerant censorship. He abolished the serfdom of the peasants. His reforms, however, were without permanent results and, after ten years of illustrious but precipitate rule, he lived to see a revolution break out against him" [Rudolf Stadelmann on *Joseph II* in 8 ENCYCLOPAEDIA 417-418].

[206] Described as a genuine enlightened despot who, having been left to her own devices by a weak and incompetent husband, read Voltaire and Tacitus, thereby learning to "see things in dark color". "She is credited for having caused the construction of a code of laws, the ancient code of Russia having been abolished in 1649. To carry out this work she summoned representatives from all classes except the clergy and serfs and presented them with an `Instruction' compiled from the writings of Montesquieu and Beccaria and concluded with a daring deprecation, `God forbid that after the completion of this legislation any other people should be more flourishing.' But Russia was totally unprepared for this reformation, and she met opposition from the nobility and the gentry. She abruptly adjourned the commission in 1768 and turned her attention to war with Turkey. Then, after the conclusion of the War and the suppression of the revolt of Pugachov in 1774, she returned to the task of providing Russia with a code. Relying on facts and precedents of Blackstone's Commentaries rather than the abstractions of the *encyclopedistes*, she herself prepared materials for important statutes" [Paul Miliukov, *Catherine II*, in 3 ENCYCLOPAEDIA 268-269].

2. HOWARD'S PENITENTIARY HUMANIZATION

Contemplating the horrors of the penal system, until then obtaining, Howard[208] wrote his book, *The State of Prisons in England and Wales*, which has acquired extraordinary circulation. It was followed by many others similarly oriented, and gave place to a great penitentiary reform that supervened shortly thereafter.[209]

E. Codification

The French revolution has favored in a decisive manner the movement for the reform initiated by Beccaria. It was followed by the age of the Codification with the French Penal Code of 25 October 1795 (it previously promulgated that of 1791).[210] Indeed, Cuello Calon states that the renovation of the penal law brought about by the enormous influence of the

[207] PUIG PENA, *supra* note 1 at 52. Cuello Calon notes that the penal law as reformed by Beccaria, the humanitarian-individualistic penal law, without doubt, sweetened and humanized the penalty. As a result, the death penalty was abolished in some countries and in others, its application was reduced only to certain cases; and it caused the disappearance in almost all parts of Europe, of corporal penalties and of infamy, and made the penalty of imprisonment the base of the penal system; brought about the construction of many new prisons with hygienic preoccupations, seeking to reform the convict by organizing a system of penalties with the correctional aims and of assistance at the time of his release, and monitored by means of charitable institutions which were created in many places. [CUELLO CALON, *supra* note 10 at 61.]

[208] (1726-90) English social reformer; although encouraging the institution of public sanitary measures, the erection of model dwellings and the improvement of educational methods, his most important work, however, was in prison reform. "In 1773, as Sheriff of Bedfordshire, he was horrified by the abominable conditions prevailing in the jails, especially the filth, disease and jail fever. He was particularly shocked to find out that many of the sufferers were innocent men who had never been prosecuted or convicted but who could not pay the jail fee necessary to secure release. His investigation resulted in advocacy of legislation, passed by the House of Commons in 1774, providing for the abolition of the fee system, the payment of a fixed salary to the jailer and the improvement of sanitary conditions in jails. He then devoted himself to the study of prison conditions abroad, made a more thorough study of English prisons and jails, and published THE STATE OF THE PRISONS IN ENGLAND AND WALES, WITH PRELIMINARY OBSERVATIONS AND AN ACCOUNT OF SOME FOREIGN PRISONS (Warrington: 1777; 4th Ed. by John Aikin, 1792), which was much discussed by students of public affairs, criminal law, and penal administration. x x x Howard's work had a demonstrable influence upon the improvement of prisons in Europe and America, inspiring the model British prison erected at Wymondham in Norfolk by Sir Thomas Beevor in 1784 and the activities of the Philadephia Society for Alleviating the Miseries of Public Prisons, the germinal source of prison reform in the United States" [Harry E. Barnes, *John Howard* in 7 ENCYLOPAEDIA 521].

[209] PUIG PENA, *supra* note 1 at 52-53; CUELLO CALON, *supra* note 10 at 60-61.

[210] PUIG PENA, *supra* note 1 at 53.

book of Beccaria found a powerful instrument in the French revolution. But, it was in the Declaration of the Rights of Man of 26 August 1789 that the Beccarian penal principles were established and procedures constitutive of individual guarantees were passed on afterwards to subsequent penal and procedural codes. Following those Codes, which had brief lives, another appeared in 1810, which became obligatory since 1 January 1811. Its bases were the principles of the utilitarian school.[211]

From this moment, the Codification acquired a universal rank, inspiring the Codes with the typical aspects of a reformed penal law, as a consequence of those currents, which are: equality of all before the law, restricting judicial discretion, fixing and broadening of individual guarantees, sweetening of the penalties, penitentiary reform, post-imprisonment protection of the convict and suppression, in terms of procedure, of the system of Inquisition.[212]

F. Scientific Period

The penal systems of individualism brought about by the reform, notwithstanding, the good that was caused from the humanitarian point of view, totally failed in its fight against criminality. Cuello Calon explains that the cause of the failure could be found in its insignificant efficacy against the criminality that was increasing during this period in formidable proportions; recidivism (*reincidencia*) had grown in an alarming manner that the defense against it has constituted a serious preoccupation among the criminalists. But its more profound causes could be found in its defective mode of focusing on the repressive problem separately from the criminal (who seems to have been conceived as an unreal imagined type by means of abstract logic), and in the penalties which were organized, not as a means for social defense against crime, but as an abstract system borrowed from the science of the criminalists. Apart from this, the penal law of this epoch had erred in its excessive generalizations and had taken as point of departure a fictitious and conventional type of reasonable person, creating on this basis the mold for all delinquents believed to be identically susceptible of mending by means of the same penalty of imprisonment, particularly, cellular imprisonment (*prision celular*), and converting this as the foundation of the repressive system, as its unique penalty, overlooking the infinite variety of human nature or the multiple categories of criminals which could be encountered in life.[213]

At this time, the necessity arose in the doctrines to advance further into the bottom of the problems of penal law. The new scientific movement was characterized by the eruption of the natural sciences into the ambit of punitive law. As a result, the old point of view which considered the criminal as "an abstract type imagined by reason" was abandoned. Instead, there is now a more attentive study of the criminal's personality. In this period denominated as scientific, the etiology of delinquency or criminality is investigated and the phenomenon of the crime is considered not as a juridical entity, but as a social phenomenon and a manifestation of the personality of the criminal.[214] The penalty did not only have, as its end, mere retribution, but a social defense purpose, now with means of correction (*prevencion especial*), of intimidation, or of elimination (*prevencion general*).[215]

It was also considered necessary to adapt the penalty to the person of the criminal (*individualizacion*), which presupposes the imposition of penalties on the basis of biological studies. Together with penalties there arose what were called "measures of security" (*medidas de seguridad*) as a new weapon for fighting against crime. This new spirit has acquired a greater diffusion in penal legislation.[216]

[211] The doctrines of Jeremy Bentham, particularly those contained in his "Treatise on Civil and Penal Legislations", which was published years before the appearance of the Code of 1810, had a profound influence in its elaboration. It is, therefore, the school of the utilitarians, according to Chaveau and Helie [THEORIE DU CODE PENAL 21 (5th ed., 1872)], to whom pertains the authorship of the Code of 1810 (it measures the penalty on the basis of the degree danger, not on the morality of the act which incriminates; however, together with utility, the ideas of morality arises at times), which aspired to realize social defense through the medium of intimidation. This criterion inspired its penalties, unavoidably going to extreme severity, tending above all to afflict the criminal, while the idea of correction appears to be absent. However, subsequent modifications has greatly mitigated its rigor and has broadly modernized its old provisions. This code, while in effect, had considerable influence in the formation of the penal codes in a great number of countries [CUELLO CALON, *supra* note 10 at 77, n. 36].

[212] *Id.* at 61.

[213] *Id.* at 61-62.

[214] *Id.*; adding that this new perspective has, therefore, displaced completely, the criterion of repression, which was previously the strict basis in the appreciation of punishable act, but that the crime had come to take account as well of the personal conditions of the offender.

[215] PUIG PENA, *supra* note 1 at 54; CUELLO CALON, *supra* note 10 at 62-63.

[216] CUELLO CALON, *supra* note 10 at 63.

The scientific moment preserves the individualistic spirit characteristic of the humanitarian period, in the sense of special prevention and reformatory aspiration.[217]

IV. CONTEMPORARY TIMES

The contemporary period saw, on the one hand, the continuing development of the positivist thought. It is characterized by an attempt to reconcile it with the classical school or, moving further away from the classical, with the accentuation of the tendency toward a sociological direction. On the other hand, there emerged a new penal direction with its own peculiar strokes with the appearance of new authoritarian political regimes. Both seek to embody the strong reaction of contemporary penal law against the apparent failure of the humanitarian principle to deal with the continuing rise in criminality, even attaining international dimension lately.

A. Rise of Positivism: Social Defense

The stadium of the scientific period developed great strokes which took several forms. After the absolute dominion in the area of penal law of the classical school, which rode it during the first three quarters of the 19th century, there arose in 1876 the sudden revolutionary attack from the positivists Lombroso, Ferri, and Garofalo.[218] It was followed by critical positivism — Carnevale, Alimena — and finally, by the school of criminal politics represented by Franz Von Liszt, who tried to actuate the general and special prevention theory with his dualist system of penalties and measures of security.[219]

In conformity with the eclectic direction, there came about in almost all countries, the reform of the penal law (C.P.I. 1930, German Project of

[217] *Id.*.

[218] Guido de Ruggiro states that "if account were to be taken of positivistic trends associated with scientific thought, the history of positivism extends through the three centuries of the modern period in which the progressive expansion of the natural sciences has taken place." Explaining, he says that, "from the beginning of the 17th century through the 18th there was a more or less latent positivism which reflected the increasing successes of the scientific conception of the world; but only in the 19th century did the positivist tendency become explicit and conscious, taking form in a definite system, that of Comte, who not only gave it its appropriate name but also made its appearance the necessary end of all modern civilization in accordance with a historical law of the evolution of human thought" [Guido de Ruggiero, *Positivism*, in 12 ENCYCLOPAEDIA 261].

[219] PUIG PENA, *supra* note 1 at 54.

1930; C. Polonia, 1932; Denmark 1933; Yugoslavia 1930; Mexico 1931; Uruguay 1934 and others subsequently).[220]

B. Authoritarian Penal Law: Defense of the State

With the appearance of new authoritarian political regimes, a penal law pursuing, above all, the preservation and the defense of the interests of the state was created. As a consequence, the political crimes — which have been given favorable treatment in the anterior systems — has now become the object of greater punishment. This changes the system of special deterrence (*prevencion especial*) of the liberal regime to a system of general deterrence (*prevencion general*), and abandoned the principle of the legality of crimes, punishing acts based on analogy.[221]

This orientation has inspired the Penal Code of Russia of 1926, the penal laws of the national-socialists, the Italian Penal law of 1926 and the special penal laws of some countries (Brazil, 1937; Rumania, 1938). After the Second World War, there had been many more dispositions enacted with an orientation towards this sense.[222]

Describing this development, Cuello Calon holds that the "authoritarian penal law" presents a living contrast to the liberal-individualistic penal law which has been brought about by the "century of enlightenment" and by the French revolution. This penal orientation, he adds, does not represent a crisis or transformation arising from the teachings of the penal sciences, nor is it a mutation of the scientific type. Rather, it is simply a result of the appearance and implantation of special political concepts.[223]

After the Second World War, as a consequence of the triumph of the political ideas sustained by the majority of the victorious powers, the post-War penal law pursued a humanization phase characterized by the repudiation of penalties that are against human nature, the insistence on the reaffirmation of the principle of legality of crimes, and in the irretrospectivity of penal law, for the abolition of analogy, by the accentuation of

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] CUELLO CALON, *supra* note 10 at 63.

the sentiment of special prevention, by the reinforcement of juridico-penal guarantees, etc.[224] This tendency has been manifested particularly in the penal norms of some post-War political Constitutions.[225]

C. *Globalization of Crimes*

Finally, with criminality assuming global scale (drug trafficking, terrorism), particularly through the increasing reach of communication and the rapidity of transportation, a new international legal order, seeking worldwide administration of penal justice, is emerging through international conferences on penal law, efforts toward the unification of penal codes, and the diffusion of treaties of extradition and declarations of reciprocity.

SUMMARY AND CONCLUSION

In this article, the author passed upon some of the historic points of penal law, from the accepted evolutionary perspective, which divides the subject into specific and proper phases: the antiquity, the middle, the modern and the contemporary ages; and across these stages the repressive function of penal law went through transformations, assuming diverse foundations at distinct times: that of private vengeance, of divine vengeance, of public vengeance, and of humanization.

It was noted that the animating principle of each period did not follow methodically nor did they substitute others completely. On the contrary, in each one of them, there only culminated a predominant penal idea, which coexisted with others different from it, even to the extent of being opposed to it.

[224] But the humanization of the penalty does not mean, says Cuello Calon, citing Bettiol's argument, that the penalty should be timid, that is not contemplated in the recognition of "syndicalist laws" for the prisoners, nor "to concede periodic permission, etc.; x x x." The "penal law" should continue to remain as such and not become a law of reward [*Id.* at 64].

[225] *Id.*; he notes, however, in respect of post-War development that together with this humanitarian aspiration and in notorious contrast against it, all penal law, if it may be so called, enacted by the Statute of Nuremberg and its twin brother, the International Tribunal of the Far East, embody a great number of fundamental norms which profoundly violate the principles previously mentioned of humanitarian penal law and of the traditional penal law with individualistic foundation, such as the breakdown of the foundation of the principle of legality and of irretroactivity of the penal law, the admission of collective penal responsibility, the establishment and imposition of the death penalty, which are against partisans of the humanitarian direction, etc. (But *see Raquiza vs. Bradford*, 75 Phil. 50, holding that war crimes are not offenses against the penal code; from which may be inferred the view that war crimes are not susceptible of treatment on the basis of principles underlying the penal code).

The antiquity was described as the age of the birth and determination of the penal law, in which the principle of private vengeance predominated. As long as acts of redress or vengeance, although regarded as rightful, may lead to further retaliation, the sanction behind rules of custom remains purely moral. But when the community begins to protect the persons who, in its opinion, have obtained due redress or taken rightful vengeance, these persons become in reality agents of the community, and the sanction behind the rules which they enforce may fairly be called legal. Such vengeance, which could not be regarded as penalty nor an act of penal justice in the modern sense, produced extraordinary evils, because one who took vengeance recognized no principle of limitation in its exercise. It was, however, gradually palliated by the *lex talionis* (representing the community's primal intervention in penal justice), which then presided over the vindictive process, under which a torment greater than that caused to the victim cannot be returned to the offender. Subsequently, the system was further mitigated by the recognition of settlement (*composicion*), by virtue of which the offended party and his families avoided the right of vengeance by means of compensation.

From the regime of pure self-help, the state intervened to legitimize and take over the function of vengeance on behalf of the offended party, although vestiges of self-help remained. In Israel, Egypt, China, India and Persia, and other areas where the ethico-religious principle prevailed, private vengeance lost ground when the divinity became the offended party and vengeance assumed a divine character. This, however, is subject to some advanced departures in few legal systems where vengeance, although meted out likewise by the community on behalf of the offended party, remained largely private in character and therefore susceptible of private settlement, even as some offenses against the community were beginning to configure (Cuneiform laws). A second period of religious character arose when the State was born. The State dictated the penalties, acting as minister of divine volition, in which case one who commits a crime offensive to the divinity should be purified by its ministers, the religion and the State being identical and the crime against one and against the other became more atrocious.

The movement towards the public principle developed in two ways: (1) when doubts about the justice of the gods developed, retribution sought

new foundations on moral and civil grounds (Greek penal law); and (2) owing to the differentiation between offenses against the community and those merely against its members (Greek, Roman, Germanic penal laws), whereby the community or state became an offended party as well, together with the differentiation between the state and religion (Greek, Greco-Egyptian, Roman penal laws).

In terms of differentiation as to offenses, Greek law distinguished between private or public offenses as to whether the object was redress of private wrong or infliction of public punishment. In Athens, the distinction was between crimes offending the community, which were penalized with extreme severity, and those merely injuring individuals, in a regime marked by a great variety of political offenses. The Byzantine epoch of the Greco-Egyptian law, likewise distinguished between public and private crimes. Similarly, under Roman law, a new penal law culminated with the triumph of public penalty, imposed with the predominant end of preserving public tranquility. There was a separation between infractions affecting the public juridical order or those violating the collective interest (synthesized in political and common crimes), and those concerning the private juridical order or injuring exclusively rights of particular persons (private crimes), in a regime marked by the subsequent increase in the number and importance of those falling under the category of public crimes. There later appeared the category of extraordinary crimes to represent an intermediate grade between public and private crimes, which included the contribution of religious crimes.

The primitive Germanic laws were, in general, dominated by the individualist principle, although a distinction was made between crimes affecting the community and those merely injuring private individuals. The concept of crime and penalty under primitive Germanic laws was geared to the idea of peace, which the criminal breaks. In turn, the breach of peace could be public, if it offends the entire community; or private, if it offends solely an individual or a family. When public peace is broken, it gives rise to loss of peace, a situation which throws the criminal out of the juridical community in such manner as to lose its protection and be considered an enemy of his people. When the breach of peace is only private, a blood feud ensues. There was, however, available to the parties a system of settlements whereby, in lieu of the vengeance of blood, the offended pedigree elects the road of settlement or compromise either by means of contract or of a judicial settlement.

The post-invasion Germanic laws differed. In terms of judicial actuations, the influence of the intentional factor from the penal law of the Church was felt in fortifying public authority by the limitation of self-help or diminution of the right of vengeance, and the transformation of judicial proceedings on the basis of the Christianization of procedural formalities (introduction of adjudication and expansion of judicial authority) and the reform of the probative proceedings. Post-invasion Germanic laws were, therefore, dominated by the approximation of the political principle or public concept, whereby the power of the state was increased and the penal law showed a pronounced emphasis on juridico-public conception. This notwithstanding, Germanic laws contributed to the evolution of the penal law an element which did not appear to have been determined in the Roman laws: the value of the individual (the individualist principle), which appears to have predominantly constituted the foundation of all Germanic penal institutions.

At this historical juncture, an extraordinarily chaotic period ensued. Local legislation provided the medium for the confusion of the various elements of Germanic, Roman and Canon laws. The principle which dominated the European common penal law from the Modern Age up to the Codification was, until later, a vigorous repulsion of the individualism which had produced social disorder and anarchy during the Middle Ages. It regarded as legitimate, in the name of state reason, all that which have been committed against those who disturbed public tranquility. But, precisely because of that, it fell into the abject situation in which horror came to dominate all aspects of the punitive law. In terms of the penal law, it was unequal, uncertain, contradictory. In terms of the crime, it was not viewed from the perspective of individual justice but from that of the interest of the state (for which the severest punishment and of broadest application were the laws of *de maiestate*). In terms of the penalties, the more tremendous atrocities constituted its modality; in terms of the proceedings which predominated in the whole of Europe, the Inquisition, with its secret investigations, was written without the guaranty of a defense.

There was, however, through all these baneful manifestations obtaining in the penal law at that time, something good and useful which was meant to subsist in order to unify the penal reform: that the state should prosecute the violation of the law committed by an individual. From this arose three institutions: (1) the *accion publica*, or that the prosecution of crimes pertains *ex officio* to the power of the state, to be exercised in the name of all; (2) the permanent judges or interpreters of the penal law, invested by the state with the power to adjudicate; and (3) the written and

secret instructions of the evidence as a necessary preparation for the judgment. Each of these elements, which have subsisted with the limitations imposed by the subsequent ages, has certainly given rise to the gravest evils. But animated by the new political doctrines which came with the progress of civilization, they have produced salutary results and have satisfied the more just exigencies.

The church, with its Canon law, brought about the first movement against the crudest penalties of the ancient times. But, as regards the influences actuated with the humanitarian end, these should be found in those ideas of the "Enlightenment", under whose influence was born a new epoch for the penal law: the humanitarian period.

Parallel to the movement in Italy initiated by Beccaria, who thrust a tremendous reproach against the abuses of the criminal practices then obtaining, there arose another in England by the works of Howard, of great transcendence as well, although its sphere of action was not as extensive because it was only limited to the field of penitentiary. Also, an attack of profound transcendence favored the movement accentuating all the individualistic character of the penal law, the French revolution, gaining a good number of adherents among Italian reformists with their Declaration of the Rights of Man and in their penal codes, the Codes of 1791 and of 1795. Individualistic postulates likewise influenced the Code of 1810, which has contributed a lot in the formation of a European penal law with a new character. These Codes signaled the beginning of the age of the Codification, which acquired a universal rank, dominating the Codes with the typical aspects of a reformed penal law, such as: declaring equality of all before the law, restricting judicial discretion, fixing and broadening individual guarantees, sweetening of the penalties, reforming the penitentiary, extending post-imprisonment protection to the convict and suppressing, in terms of procedure, the system of Inquisition.

The penal systems of individualism brought about by the reform, notwithstanding the good that was caused from the humanitarian point of view, totally failed in its fight against criminality. This failure was attributed to its insignificant efficacy against the criminality that was increasing during this period in formidable proportions but, more profoundly, to its defective mode of focusing on the repressive problem separately from the criminal, who was conceived as an unreal, imagined type by abstract logic, and in the penalties organized, not for purposes of social defense against crime, but as an abstract system borrowed from the science of the criminalists. Apart from this, the penal law of this epoch erred in excessive generalizations. It took, as point of departure, a fictitious and conventional type of reasonable person. On this basis, it created the mold for all delinquents believed to be identically susceptible of mending by means of the same penalty of imprisonment, particularly, cellular imprisonment, and converting this as the foundation of the repressive system, as its unique penalty. It clearly overlooked the infinite variety of human nature or the multiple categories of criminals which could be encountered in life.

The necessity arose, at this time, to delve deeper into the problems of penal law. A new scientific movement, characterized by the eruption of the natural sciences into the ambit of punitive law, abandoned the old point of view which considered the criminal as "an abstract type imagined by reason" and, instead, attentively studied his personality. In this period, the etiology of criminality was investigated and the phenomenon of the crime is considered not as a juridical entity, but as a social phenomenon and as a manifestation of the personality of the criminal. The penalty no longer has, as its end, mere retribution, but a social defense purpose, this time with means of correction, of intimidation or of elimination. It is also considered necessary to adapt the penalty to the person of the criminal, on the basis of biological studies. Employed with penalties were new weapons against crime: measures of security. While this new spirit was acquiring greater diffusion in penal legislations every day, the scientific moment preserved the individualistic sentiment characteristic of the humanitarian period, in the sense of special preventive and reformatory aspirations.

The contemporary period saw, on the one hand, the continuing development of the positivist thought; and on the other hand, the emergence of a new penal direction. Both seek to embody the strong reaction of contemporary penal law against the apparent failure of the humanitarian principle to deal with the continuing rise in criminality which is even attaining international dimension lately.

The so-called "authoritarian penal law," by its spirit and orientation, spells a living contrast to the liberal-individualistic penal law of the "century of enlightenment" and the French revolution which, however, does not represent a crisis or transformation arising from the teachings of the penal sciences, nor a mutation of the scientific type, but simply a result of special political conceptions. After the Second World War, with the triumph of the political ideas of the victorious powers, the post-War penal law pursued a new humanization phase characterized by the repudiation of penalties that are against human nature; the insistence on the reaffirmation of the principle of legality of crimes and in the irretrospectivity of

penal law; by the move towards the abolition of analogy; by the promotion of the sentiment of special prevention; and by the reinforcement of juridico-penal guarantees. All of these are manifested particularly in the penal norms of some post-War political Constitutions.

Finally, with criminality assuming a global scale, particularly through the increasing reach of the media of communication and the rapidity of means of transportation, a new international legal order, seeking more effective international administration of penal justice, is emerging through international conferences on penal law, efforts toward the unification of penal codes, and the diffusion of treaties of extradition and declarations of reciprocity.

ADJUDICATION AND ENFORCEMENT OF TRADEMARKS IN THE PHILIPPINES*

HECTOR L. HOFILEÑA**

INTRODUCTION

A. *Themes Underlying Philippine Trademark Law*

Two general themes underlie Philippine trademark law. The first is that trademarks are property. Thus, Section 2-A of Republic Act No. 166, as amended, recognizes and protects the *ownership* and *possession* of trademarks, and provides that:

> Anyone who lawfully produces or deals in merchandise of any kind or who engages in any lawful business, or who renders any lawful service in commerce, by actual use thereof in manufacture or trade, in business, and in the service rendered, may appropriate to his exclusive use a trademark, a trade-name, or a service-mark not so appropriated by another, to distinguish his merchandise, business or service from the merchandise, business or service of others. The ownership or possession of a trade-mark, trade-name, service-mark, heretofore and hereafter appropriated, as in this section provided, shall be recognized and protected in the same manner and to the same extent as are other property rights known to the law.

The proprietary character of trademarks may also be inferred from the fact that trademarks are considered products of intellectual creation, which, in turn, the law treats as a mode of acquiring ownership.

The second theme pervading Philippine trademark law is that of fair competition. The Civil Code establishes as a principle of human relations that:

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