PARLAMENTOS:
A LEI, A PRÁTICA E
AS REPRESENTAÇÕES
Da Idade Média à Actualidade

PARLIAMENTS:
The Law, The Practice and
The Representations
From the Middle Ages to
the Present Day

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THE SPANISH PARLIAMENT AND WOMAN'S PENAL CONDITION DURING THE LEGISLATIVE PERIOD 1847-1848*

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Summary: The penal vision of women in nineteenth-century Spain responds to a model of woman based on patriarchal conceptions, focused on the protection of honesty and the maintenance of the family and social order. This becomes visible during the parliamentary debate of the Spanish Penal Code of 1848.

Key words: woman/women, gender studies, nineteenth-century Spanish parliament, Spanish penal code of 1848


I. Introduction

Historically, the role of women in society has called the attention of both jurists and legislators.

This study has as its aim to show how the liberalism of the first half of the nineteenth century in Spain did not modify woman's legal condition on accessing the penal codification. An analysis of the 1848 Penal Code will be carried out to that end. The relevance of that legal text regarding the topic under study here lies in the fact that it is in this Code where the foundations were established for the building of a specific penal vision of women that was going to survive for more than a century and a half, until the arrival of the currently in force penal code of 1995. On the other hand, we seek to highlight how that penal vision of women is the reflection of a socially accepted model based on the strengthening of a set of moral rules supported on patriarchal conceptions which are closely linked to one of the basic pillars of the ruling Moderate Party: the maintenance of law and order. These are all issues that came to the fore during the parliamentary debates of the aforementioned legal text from the perspective of the Progressive and Moderate parties.

II. Woman's status in nineteenth-century Spanish Penal Law

The prevailing liberal discourse and gender cultural representations in nineteenth-century Spain were characterised by exclusive, discriminatory practices which led to reinforce the position of the woman as a dependent person.

Along these lines, a model was shaped that focused on domestic life and on the maternity cult, following a clear patriarchal stance which assigned women an ideal code of behaviour based on submissive obedience to family authority, chastity, discretion and faithfulness.

Nineteenth-century Spain thus collected the model stemming from the European cultural tradition based on the idea that women embodied such images as indiginity, frailty, intellectual weakness and even lechery as well as evilness, which led to place them as more prone to commit certain crimes which could somehow endanger the physical integrity or the honour of men, or which represented an attack against the family.

Starting from the idea that Penal Law –like any other Law– is a cultural creation, the penal legislation revolved around two ambivalent postures in relation to the model of woman described above: on the one hand, it focused on women’s sexual behaviour when it defined crimes like adultery, abortion, estupro [rape of a minor], seduction or infanticide, all of them figures which specifically allude to maternity and, ultimately, to the family structure. On the other hand, and in parallel, it set a limit to penal punishment for women because of their lesser rationality, presuming that they did not always act knowing what they were doing and because their body, naturally weak, would not endure the punishment – to which was added its life-reproducing function.

III. Women in the Spanish Penal Code of 1848

The capacity to exercise the government powers in Spain during the legislative period 1847-1848 under the reign of Isabel II was in the hands of the Moderate Party. In accordance with the moderate ideology, the State’s main function rested on four basic pillars: law and order (a basic unquestionable principle of ‘moderantism’), associated with the consolidation of the institutions and an essential premise for material development; security and protection of property; an overall centralising and standardising policy: and, finally, as an ideological foundation of this new period, doctrinalism.

1 María Alcalá Sánchez, La discriminación hacia la mujer por razón de género en el Código penal, Reus, 2006, p. 26.
A distinctive sign of this party and this period was the Constitution of 1845\(^3\).

One of the most significant texts enacted during the rule of the Moderate Party is undoubtedly the Penal Code of 1848, which served to guarantee the defence of the new legal values created by the organisation of the Moderate State. However, it is necessary to highlight that the Penal Code represented a technical type of reform, the need for which was felt by every representative of liberalism, since it put an end to the outdated penal legislation of the Ancien Régime which remained in force until the moment in which this new Code was enacted\(^4\).

Although it is true that the codifying task meant an evident progress regarding the classification and grouping of crimes of a related nature, as well as the precise and clear description of crime behaviours, the meaning assigned to the crimes characterised by the feminine gender essentially shows continuity with respect to the previous concepts\(^5\). Therefore, the Spanish Penal Code of 1848 largely collected the same patterns of the Ancien Régime's legislation materialised in the Siete Partidas [Seven Divisions] of the 13th century and the Novísima Recopilación [Newer (Last) Compilation (of Spanish Laws)] of 1808\(^6\). Nevertheless, it is worth highlighting the relevance of the treatment given to women by this legal text, as the image of the penal subject 'woman' that will survive until the twentieth century, not only in Spain but also in Latin America, was shaped in 1848\(^7\).

It must be remembered that this Code was born within a social context characterised by a strong tendency toward the oligarchy, and in which popular classes hardly counted. From the purely political perspective, it was a reflection of the postulates of Liberal Democracy from the point of view of the Moderate Party's ideology.

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\(^1\) Jose Luis Comellas, Los Moderados en el poder (1844-1854), Madrid, 1979.


\(^5\) Adela Asua Bastarria, "Las agresiones sexuales en el nuevo Código penal: imágenes culturales y discurso jurídico" in VV. AA., Andalucía del Código penal desde la perspectiva de género, Vitoria, 1988, p. 61.


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\(^10\) In Spain, this aggravating circumstance appears in the Penal Code of 1822. The regulation introduced in 1848 is maintained in the subsequent Penal Codes until the penal reform of 1983.

\(^11\) This circumstance was not repealed until 1983. María Alcalde Sánchez, La discriminación hacia la mujer..., pp. 56-67.

\(^12\) J. J. Zapatero Ferrer, La circunstancia de desprecio de sexo en la jurisdicción del tribunal Supremo, Valencia, 1980, p. 11.


Doctrinally, they got to the point of saying that the right to keep the honour (virtue) "was not less precious than the one we have to keep our life; they are losses which cannot be recovered and, therefore, it is licit to use all the necessary means to keep it intact"24.

III.2. Woman’s vision in the crime typology

The traces of the penal vision of women are easy to find through the crimes where the woman is identified as an active subject and which entailed a kind of behaviour that affected the honour of the man on which they depended, whether it was the husband or the father: infanticide to conceal her dishonour, abortion or adultery. Also through those in which she assumed the role of victim or passive subject, in which case the main concern was to protect the model of mother, wife or daughter: these are the cases of estupro [rape of a minor], abduction, uxoricide or rape.

On the other hand, it can be illustrative to examine the Rúbricas (sections or paragraphs) of the Titles where the crimes described using the feminine gender are situated: Crimes against honesty25, in which are brought together a whole range of behaviours which go against both marriage – the case of adultery – and family obedience – the case of abduction– or good customs – as would be the case of disorderly conduct. With this approach, they ran the risk of putting the legal concept of honesty on a level with the religious concept, which would lead us to identify sex with sin and sin with crime. Along with that, a ‘lack of protection’ could be incurred, since highly vested interests intervene in these facts26. It was all about protecting morality and good customs since, as the doctrine said "they were the foundation of the family, the condition of society"27.

The crime typology associated with women was thus the result of a ‘collective imagination’ which linked sexual morality to a certain behaviour. Therefore, the legal protection of female honesty appeared associated with a specific social order, where unlike what happened to males, the woman’s honesty was related to her marital status: single, married or widowed. Her dignity was determined by her submission to the rules which defined her social presence and personal development limiting it to the ‘sphere’ of wife and mother through marriage. Any other situation was considered irregular and even dangerous, as it represented a threat to the morality that the civil and religious authorities had to pursue28.

A.– The delinquent woman

– Infanticide

One of the typically female crimes is infanticide, the murder of a newborn baby by the mother or the grandparents on the mother’s side to conceal the woman’s dishonour (Art. 327)29. This clearly reflects the importance assigned by the nineteenth-century Spanish society to family honour highlighting its significance as a social fact with important legal consequences, because “honour is... relative, mutable, mainly social and is fuelled by the collective beliefs of each historical moment, the common truth believed and admitted at each point in time... And all of it lived with extraordinary intensity, bordering on paroxysm”30.

In this case, the protection of honour acquires such prevalence that it reduced the high rank corresponding to the higher good represented by human life31. In this way, the legislator of 1848 continued an entire historical tradition characterised by a greater degree of leniency toward the mother who kills her baby in order to hide her dishonour, an act that was linked to the mental alterations suffered by women after giving birth32.

As an innovation in the regulation of 1848 stands out the consideration as passive subjects of infanticide both of the mother and of the grandparents on the mother’s side, the latter being driven by the common motive of concealing the mother’s dishonour. This motive is not established as a legal presumption, though, and must be proved, especially when the crime is committed by the grandparents33.

This equally reflects an important change: the indifferent consideration of the mother’s marital status, which entailed the possibility of her being single, married, divorced or widowed, as long as the purpose sought is to hide dishonour34.

24 Art. 327: "The mother who should kill her son who was still not three years old trying to conceal her dishonour, will be punished with the sentence of minor imprisonment. The grandparents on the mother’s side who commit this crime to conceal the mother’s dishonour with that of major imprisonment. Outside these cases, anyone who kills a newborn baby will be punished with the sentences corresponding to homicide". Tomás María de Vizmanos & Ciro Álvarez Martínez, Comentarios al Código Penal. Madrid, 1848, vol. II, page 329. José María Stampa Braun, "Las corrientes humanitarias del siglo XVIII y su influencia en la concepción del infanticidio como delictum exceptum", in Anuario de Derecho penal y ciencias penales, 6, 1953, pp. 47-76, pp. 58-59.
25 Rafael Serra Ruiz, Honor, honra e Injuria en el Derecho medieval español, Murcia, 1969, pp. 15 and ff.
29 María Isabel Martínez González, "Delito de infanticidio", in Revista de Derecho Penal y Criminología, 3, 1993, pp. 413-552, p. 427.
The considerable reduction of the sentence for the woman was strongly criticised by commentators. So it was expressed by Mr. Francisco Pacheco:

“We understand and approve that the plan to conceal dishonour should be taken into account by the laws...to have the sentence reduced...humanly, we find it absolutely repulsive. To this idea which did not restrain her from preventing the birth of her baby cannot morally be given the value or the strength that the article gives it to excuse the death of a three-year-old son. Honour does not suffice; it takes a beast’s heart to do that.”

However, the cause of honour disappeared when the baby’s death did not fulfill the requirements described above, in which case it was regarded as a simple homicide.

— Abortion

The same configuration as a privileged type, the same excuse and a justification identical to that of infanticide can be found in the reduction of the sentence in the case of abortion caused by the woman to conceal her dishonour (Arts. 328-330). The doctrine did not oppose the established regulation, but it is worth highlighting among the comments a remark of the doctrine which suggested that the case of abortion caused by the parents in order to hide their daughter’s dishonour should be taken into account, lessening the punishment just like in the case of infanticide.

— Adultery

Regarding crimes of marital unfaithfulness the different consideration depending on whether the offender was a man or a woman is evident.

A case which deserves special attention is that of the crime of adultery, in which both the married wife and her lover were considered adulterers (Art. 349). We are thus in front of a crime where the foundation does not only lie in the protection of the sexual morality which prevailed in the society of the time, but which also responds to an attack against a basic social institution, the family, which had been determined by the characteristics of marriage for centuries.

It was seen as an attack against the sacrament of marriage which damaged the rights both of the father and of the legitimate children, as it placed the latter on equal footing with the children born from the adulterous relationship. The reason for the rigour toward the woman was clearly expressed by the doctrine:

“the woman is the centre of the family, just as the man is the head. The lock ok the former substantially destroys the marital society which the man cannot destroy. The unfaithful woman gives unjust rights...the unfaithful woman dissolves all the bonds which no other marital unfaithfulness can dissolve.”

It consequently became clear that the husband was the only person who could measure the resulting damage inflicted on the family and on his own honour, and the only one who was legitimised to exercise the right of vengeance and, therefore, this crime could only be reported by the offended husband (Art. 350).

The legislation places restrictions on the faculty to exert the adultery action, establishing the obligation for the lawsuit to be lodged against the two guilty individuals, as long as the adultery had not been consented or either of them had been forgiven (Art. 350). However, it grants the husband the faculty of remitting the sentence imposed on his spouse, for which he would only need to meet her again. In that case, the pardon will also reach the adulterous man, i.e. the lover (Art. 351).

The same principles are observed in Art. 352, which stipulates the civil action that adultery entails in the case of divorce; since adultery is a legitimate cause of divorce and the husband has to request it separately from the criminal accusation and before different courts, the legislator assigns a different value to acquittals or convictions in trials of divorce by adultery. In the first case, it establishes that the husband cannot try to lodge the adultery lawsuit and, in the second one, that it will have no criminal effects at the criminal trial.

It was punished with a minor imprisonment sentence but the doctrine criticised the mildness of the sanction attributing it to the customs of the Spanish society of the time.

— Uxoricide by adultery

Closely related to adultery, one can find an extraordinary reduction which punished an offended husband who killed the adulterous lover or his wife only with banishment (Art. 339). It was the traditional uxoricide by adultery. This introduced a penal privilege which implied the abolition of the legal punitive authority corresponding to the State, which
transferred its power in adultery matters to the affronted husband, in a sort of private vengeance44. This decision was justified by the modernity of Spanish society and by the irresistible impulses of the husband to defend his honour, in a clear brutal expression of woman’s defencelessness45. Nevertheless, the doctrine regretted that the 1848 Code had not repeated the traditional regulation present in our historical laws exempting the husband and the father from responsibility: “in our opinion, it is one of those traces of honour and gentlemanliness that must be respected and remain untouched”.46

Finally, the 1848 legislator declares exempted from the reduction affecting uxoricide the husband or the parents who had encouraged or facilitated the prostitution of the wife or the daughters, an exception which is closely linked to honour as a justification since it was understood that, as they allowed that pursuit, they were dishonoured; they lacked honour. Commentators thought that this was a good decision, although Mr. Pacheco anticipated the difficulty in its application47. This regulation was going to remain in Spain until the penal reform of 196348.

In parallel, the Code did not contemplate the adultery committed by a married man, but punished his behaviour if he had a lover causing scandal. It is worth highlighting that not only the adulterous husband but also his female lover were punished. The doctrinal justification of this decision is very illustrative regarding the need to protect the male: “control the existing inequality in favour of men”, considering that the rigour of the law was excessive because it put on a level having the mistress outside the home with scandal and having her inside the home49.

B.– The woman as a victim

– Rape

Doctorially, it is conceived as a more serious crime than adultery due to its double nature as an attack against honesty and against public security44. Mr. Pacheco considers it an attack against human beings, and in his view it belongs to the category of damages, having as two of its outstanding characteristics rudeness and brutality44.

Art. 35444 defines ‘rape’ as the act of lying with the woman. It can be carried out in three different ways: Using force or intimidation; Depriving the woman from reason or sense, so that she cannot offer resistance, or taking advantage of the fact that she is deprived from reason to sexually abuse her – in this case, force and even resistance are absent; and finally, when the victim is not twelve years old yet regardless of the circumstances (in this last case, the code of 1848 moved away from its European models, which fixed higher ages50).

According to commentators, it was not necessary to appreciate the existence of force, a desperate resistance on the part of the victim, “one did not have to look for heroines in women or giants in rapists”. There could be physical as well as moral intimidation, and the fixation of twelve years of age tried to provide a guarantee of innocence44.

Rape is punished with cadena temporal [imprisonment for a period ranging from twelve years and one day to twenty years], regardless of whether the woman is married, single, widowed or, even, a ‘fallen woman’ (prostitute). Mr. Pacheco thought that it was more acceptable to adjust the sentence according to the woman’s honesty conditions and he wondered if the law should protect “a prostitute and a virgin” in the same way50.

– Estupro [rape] and corruption of minors

In contrast with the Penal Code of 1822, which regulates it in a scattered way across several titles and chapters, the 1848 legislator presents this matter in a unified way within a single article50.

Estupro [rape of a minor] is defined as [having] sexual activity with a maiden above 12 and below 23 years of age (Art. 356). Therefore, the passive subject is always a woman, her honesty or maidenhood becoming essential elements in this crime50. It was configured by the doctrine as the carnal or unlawful acts of a maiden in which seduction intervenes. This interpretation has

45 Austrian penal code of 1803 (Art. 112), Naples Code of 1819 (Art. 339) and Brazilian Code of 1831 (Art. 219).
47 Joaquín Francisco Pacheco, El Código penal..., III, page 132.
48 In the Penal Code of 1822, estupro was scattered among crimes against good customs (Title VII, Chapter II, Art. 559) and crimes against human beings, in the chapters referring to abodution, force and violence against human beings (Arts. 677 and 678, 679, 675, and 664 and ff.) and to premeditated estupro (Arts. 686, 687 and 688).
49 Art. 356: “The estupro [rape] of a maiden older than 12 and younger than 23 committed by a public authority, priest, domestic servant, tutor, teacher, or any other qualified person in charge of the education or protection (custody) of the raped maiden will be punished with the sentence of minor imprisonment. The same sentence will be applied to the man who commits estupro with his sister or descendant, even if she is older than 23. The estupro committed by any other person with the intervention of deception will be punished with the sentence of correctional imprisonment. Any other dishonest abuse committed with the same individuals and in the same circumstances will be punished with correctional imprisonment.”

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determined the Spanish doctrine as well as the praxis until very recently. The Code distinguishes between estupro cualificada [qualified rape of a minor] and estupro simple [simple rape of a minor] depending on the individuals who intervene as active subjects and the way in which the crime is perpetrated. Estupro cualificada is the one committed by a public authority, priest, domestic servant, tutor, teacher or any qualified person to whom the education or protection (custody) of the raped maiden has been entrusted. Commentators understood that, in these cases, it could and had to be suspected that carnal access was achieved either using the public or private authority exerted or abusing trust. This kind of estupro with unfair advantage is punished with minor imprisonment.

As for estupro simple, this expression describes the rape of a minor committed by any other person – although the additional requirement of ‘intervention of deception’ is demanded in this case – and the punishment for the crime is correctional imprisonment (Art. 336, third paragraph). The doctrine highlighted the vagueness of the term ‘deception’, pointing out how difficult it was to specify it and expressing that it was not possible to include within this category simple promises of marriage; they had to be types of deception of such magnitude that could lead to the commission of the crime of estupro because, otherwise, it would open “the door to the evil ways of many women perfectly informed who would speculate with the simplicity of young males.” In this case, it does not matter if the woman’s age is above or below twenty-three years of age; what is punished is the deception.

Finally, in the second paragraph of the same Article 356, the 1848 legislator punishes incest, though the Code does not use that name, configuring it as a form of unfair-advantage-based estupro always committed with the sister or descendant and sanctioning it with the punishment of minor imprisonment. This configuration of incest was going to be maintained in the subsequent Spanish penal codes, with the exception of the Penal Code of 1928. In this case, no attention is paid to the age for appreciation purposes and the crime will be taken into account even if the woman who has suffered estupro is older than 23.

The doctrine gave a favourable welcome to the regulation of incest, as it represented a break with the traditional legislation, which considered it a sin and punished it very severely: “Let religion condemn such actions, let it repress them... the confessional..., It seems fair and normal to us. But the law must do without them and avoid causing with its application greater scandals than those it seeks to correct.”

In the same chapter, the legislator punishes corruption of minors when the following circumstances occur: that prostitution or corruption is promoted; that the passive subjects are minors; and that it is carried out habitually and with abuse of authority or trust for the purpose of satisfying the desires of a third person. It was punished with correctional imprisonment (Art. 357).

Commentators agree on the fact that, in this case, the punishment falls upon qualified procuring. Mr. Pacheco describes it as ‘ugly’ and calls the individuals who practice this activity “despicable.”

- Abduction

The Code of 1848 regulates woman’s abduction within the crimes against honesty distinguishing between abduction with violence (Art. 358) and the one carried out through seduction (Art. 359).

This case is characterised by its double nature as damage to decency and as an attack against human beings or at least against their freedom.

Commentators understood as ‘abduction’ the violent or illegal kidnapping of a woman from the house or the place where she lives, either with dishonest intentions or to marry her getting around the impediments that might exist.

The most serious form of abduction corresponds to that carried out with dishonest purposes and against the will of the abducted woman. The doctrine considers that, in this case, it does not matter if the woman is married, single, widowed or a maiden. The legislator of 1848 associates the idea of violence with abduction when the abducted woman is younger than 12, punishing both crimes with the sentence of cadena temporal (Art. 358).

The Code also contemplates the case of non-violent abduction, that is, with the consent of the abducted woman, on condition that the latter is above 12 years of age and below 23 years of age, punishing it with a sentence of minor imprisonment (Art. 359).

We must highlight the different terminology used by the legislator in the two cases described above. In the first one, the legislator speaks about “woman” and in the second, about “maiden”. Mr. Pacheco attributes it to the different condition of the person on which force or seduction is used.

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60 José María Rodríguez Devesa, Derecho Penal español, op. cit., page 177.
61 Tomás María de Vizmanos & Ciriaco Álvarez Martínez, Comentarios, II, p. 379.
62 Joaquín Francisco Pacheco, El Código penal..., III, pp. 139-140.
63 Pedro Martín Llosants, Índice alfabético razonado de delitos y penas y de faltas según el Código penal de España, Barcelona, 1861, page 70.
64 Tomás María de Vizmanos & Ciriaco Álvarez Martínez, Comentarios, II, p. 379.
66 José María Rodríguez Devesa, Derecho Penal Español, op. cit., p. 182.
— Dishonest abuses

The 1848 legislator sanctions dishonest abuses in two different sections dedicated to rape and estupro [rape of a minor] with a wording that has been maintained in the subsequent Spanish penal codes.

Art. 355 regulates dishonest abuses putting them on a level with rape, punishing with minor to correctional imprisonment those committed on individuals of one or the other sex, when any of the circumstances expressed in the case of rape occur.

The Code refers to those cases where the same force exists as in rape but without the complete consummation. It does not matter the sex either of the passive or of the active subject. As it was explained in the doctrine at the time, the article stands out for its vagueness and the great length of the sentences, which is in tune with the variety of forms that this crime can adopt.

Similarly, Chapter III—dedicated to estupro—and more precisely, the 4th paragraph of Art. 356, regulates the dishonest abuses committed on individuals of one or the other sex by the same subjects and in the same circumstances described in the case of estupro, i.e. by a public authority, priest, domestic servant, etc., or with a sister or descendant, with the intervention of unfair advantage or deception. The sentence of correctional imprisonment is imposed on them.

C. The importance of complementary provisions

The penal code of 1848 established a series of common provisions for those crimes in which the woman appeared as a victim: rape, estupro, and abduction (Art. 354 and ff.). Although they had to be regarded as an extra protection, in fact they demonstrated the uneven treatment of women with respect to men and constituted another expression of the relevance of the social consideration of female honesty.

Following them, crimes against women were configured as private crimes although this type of crimes did not present any of the characteristic elements of a private crime. The woman who had been raped, a victim of estupro, or abducted, could only receive compensation for the aggression suffered if she reported the offender before the legal authority that had to verify the certainty of the aggression (Art. 361). This seems to suggest that, unlike the other types of public crime, this was not a crime against society or lacked the necessary seriousness to be of interest for the State.

The configuration of these crimes as 'private' apparently granted women full control over the persecution of the crime, but in fact the private character reduced the effectiveness of the crime due to the evident pressures received by the woman, either from her family or social environment or from the aggressor himself, which very often made this behaviour remain unpunished. Furthermore, blackmail was favoured and, above all, the collection of pieces of evidence for the crime was prevented.

From the doctrinal point of view, the consideration as private crimes was justified by the personal nature of the aggression and the belief that the trial sometimes caused more damage to the offended woman than to her aggressor, as the offence suffered against her honour was made publicly known – after all, these crimes were generally committed without any publicity. In any case, the truth is that those crimes were accompanied by the scandal deriving from being public and known to the authorities and they often went unpunished because the victim could not or did not lodge a lawsuit. Seeking to avoid this type of inconveniences, the authorities proceeded – by means of a Decree of September 21st, 1848 – to give the offended woman a greater degree of protection through the reform of Art. 361, in which was stipulated that in rape lawsuits, the action could not only be initiated by the offended person, but also by her tutor, father or grandparents, even if they did not fill out a form. And a case was added in which, should the offended woman lack – due to her age or moral state – the personality to appear before the court, and if she had no parents, relatives or tutors that could report the crime to the authorities, the prosecutor was allowed to do it on her behalf by public fame. Thanks to it, the abovementioned crimes did not remain unpunished save for situations in which serious reasons advised the offended party to forgive or forget about them.

Similarly, it is established that the aggressor would be freed from the punishment which might be imposed on him if he gets married to the affronted woman (Art. 361), this being an order criticised by Mr. Pacheco, for whom the later marriage after the rape should only serve as an extenuating circumstance and not as a circumstance exonerating the offender completely from the punishment or sanction.

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44 Art. 12th, Real Decreto 27 de septiembre de 1848; Art. 361: "... In order to proceed in the lawsuits for rape and abduction carried out with dishonest intentions, it will be enough with the report filed by the person concerned, by her parents, grandparents or tutors, even if they did not fill out a form. Should the person offended lack the personality to appear in court – due to her age or moral state – and if she additionally found herself in a situation of complete helplessness, with no parents, grandparents, brothers, tutors or guardians who could report the crime to the authorities, the action could be undertaken by the trustee-barrister or the prosecutor by public fame.
45 Art. 361: "The individuals accused of rape, estupro or kidnapping performed for dishonest purposes can only be punished at the request of the affronted party. The offender will be exempted from the punishment imposed if he marries the offended woman."
46 Joaquín Francisco Pacheco, El Código penal..., III, p. 163.
But the legislator of 1848 was not content with the mere examination of the sentence imposed; he also points at civil responsibility (Art. 362), establishing various possible compensations for the damage caused. He fixes the payment of an allocation if the woman was single or a widow, the specification of the exact amount depending on the courts' appreciation. According to commentators, this appreciation had to be made in accordance with the victim's honesty conditions and, above all, with the offender's fortune.

It additionally oblige to the recognition of paternity, provided that the quality of origin did not prevent it. Commentators understood that, in this case, penal texts had to be submitted to civil laws and, therefore, the recognition would not be possible if the children came from adultery, incest or a sacrilegious union.

Furthermore, the aggressor is punished with the obligation to [provide] food for the descendants, the interpretation by the doctrine being that the Code established an absolute precept and repealed any provision to the contrary, regardless of what the origin of the descendants might be.

Finally, the sentence imposed by the Code on the offender is also applied on the lineal ancestors, tutors, guardians, teachers or any other person who, with abuse of their authority or position, should cooperate as accomplices in the perpetration of the crime. To this is added the accessory punishment of a special disqualification for life imposed on teachers or any other person in charge of the guidance or education of youths (Art. 363).

IV. Woman's penal consideration in the nineteenth-century Spanish Parliament

This regulation of crimes against honesty received the attention of the Spanish Parliament during the 1847-48 legislative periods. The Penal Code was subjected to discussion in the Legislative Chambers during those two years.

It is necessary to highlight that the Penal Code of 1848 constituted an example of the use that the Moderate Party made of the legislative delegation with the aim of achieving the approval of bills of law in the Chambers without going through a detailed parliamentary debate. Despite the relevance of the issue, the Penal Code was presented before the Chamber for its passing through an Authorisations Act. To this must be added the actual composition of the Chambers, which resulted from the 1847 election that had given a majority to the Moderate party, although among the Progressive party minority could be found the most outstanding figures of that party. All these circumstances did not prevent the Code from going through a parliamentary debate, and the objections made to it were more numerous and also more significant than expected.

Woman's condition did not give rise to extremely conflicting postures between the members of the Moderate and Progressive parties. The review of the record of parliamentary proceedings both at the Congress and at the Senate allows us to state that the model of woman put forward by the Code was generally accepted by the followers of both parties. The objections made to crimes against honesty did not contain a demand on the part of progressive politicians to improve the treatment received by women.

In general, the remarks focused on the convenience of toughening the sentences, requesting the return of the Ancien Régime's regulation or criticising those aspects in which male honour or privacy could be under attack.

It is worth highlighting the participation of a Progressive politician, Mr. Gómez de la Serna, who spoke about carnal crimes when he referred to crimes committed by women. In his opinion, a contradiction existed between the civil legislation and the Penal Code in relation to the regulation of rape, estupro and abduction, where the marriage between the culprit and the wife was contemplated. For Gómez de la Serna, this allowed the investigation of paternity, thus destroying the eternal civil principle of giving the consideration of father to the person designed as such by marriage. In the same sense, he claims that the Code should not have granted the right to food of "the woman who has been an accomplice in a crime and to the survival of the descendants who are not recognised by civil law". He had a very hard opinion about this issue: "It will only be useful... for those women who traffic with their shame; it will not help at all in the correction of bad behaviours." This revealed the coincidence between Moderates and Progressives regarding the role of the woman as a person subjected to the family authority and responsible for social morality with her conduct.

The answer came from the Justice and Grace Minister himself, Mr. Lorenzo Arrazola, who felt highly involved in these matters, since he admits that estupro was included in the Code at his request. He focuses the topic saying that, in this case, they were not talking about a wedding or about the fruits of marriage, and that paternity issues are positive and negative, and that the husband of the woman who has been the victim of estupro has no obligation to recognise the children born from this crime, and finishes categorically:

"it is a sufficient disgrace for the woman that she does not have a strong brother who can force the authorities to do justice to her, without us increasing the number of victims preventing them from going to the courts to request the protection of the laws".


Another issue that was the object of criticism was abortion, in relation to which a member of parliament, Mr. Corzo, highlighted a possible contradiction between the concept of crime contained in the 1st article and the regulation of abortion. In his view, strictly speaking, there was no crime of abortion in the case of miscarriage (non-intentional), because there can be no crime when there is no will, and if it is punished taking into account the violence used, then it should be included among the category of damages.

We think it is interesting to carry out an analysis of the crime figures which were excluded by the legislator of 1848 because they represent a manifestation of the political-criminal orientation of the Code as well. In contrast with the traditional historical penal legislation, it is illustrative to check that a large part of the crimes excluded referred to honesty, as this was a reflection of the progress made by Spanish society, who had stopped regarding some actions as religious crimes.

The doctrine dealt with these omissions. Mr. Pacheco justified them in general because the action of justice courts could extend “neither to all that understanding can conceive nor even to what must be condemned by philosophy and public morality”.

Among the crimes related to women were omitted: prostitution, procuring, concubinage without scandal and incest.

The commentator Mr. Pacheco analyses these omissions thoroughly and explains the reasons for their exclusion. He justifies the limitation of the punishment for incest to the sister or descendant because it was subsumed in estupro with unfair advantage. Similarly, he finds a justification for the absence of punishment for prostitution and procuring in the need to avoid greater evils and also because he understood that this was an issue that should be covered in Ordinances and Regulations rather than in a Penal Code.

Also legal journals treated these absences. In el Derecho Moderno [Modern Law], Mr. Francisco de Cárdenas, justified the omission of prostitution by the lack of social interest due to the fact that no one was directly affected. This highlighted once again the extent to which the old laws had fallen into disuse.

These exclusions were also examined in the legislative Chambers. At the Congress, Mr. Pardo Montenegro emphasises the absence of traditional crimes in Spanish historical penal legislation. In its defence, The Grace and Justice Minister, Mr. Arazola, argued that the absence of penalisation was a consequence of the evolution experienced by Spanish society in its customs and education, and he received the support of Mr. Claudio Moyano and Mr. Seijas Lozano equally highlighted that crime was no longer a sin “Religion... is one thing and law is another [different thing]” and, therefore, the Code only penalised in two circumstances: when decency was offended – in crimes involving disorderly conduct – and when violence was used.

Of more interest is the criterion adopted by the Chambers to consider that the punishment imposed on adultery was too mild. The members of parliament highlighted the fact that uxoricide was not contemplated in accordance with the traditional Spanish legislation, which granted the husband the power to kill the two adulterers. Mr. Corzo described this absence as immoral and suggested that the Code should modify the wording saying explicitly: “If (the husband) should kill them both he will be exempted from punishment”. The same opinion was expressed by another member of parliament, Mr. Coira. No progressive member of parliament refuted the opinion of these two conservative politicians.

V. Conclusions

Woman’s consideration in the nineteenth century escaped neither the assignment of the place that she had to occupy within the scheme of the dominant and imposed social order – traditional, hierarchical and patriarchal – nor the model of behaviour that she had to follow.

Nineteenth century Spain’s codified Penal Law reflects a social context which did not stop being patriarchal and which revolved around the consideration of the family as the basic core of social organisation and also as an essential instrument to maintain the social order that they wanted to establish.

The aim was to protect morality and good customs, which were seen as the foundation of the family, the basis of society and a fundamental pillar for the maintenance of the law and order that everybody desired.

In short, it was all about protecting decency, one of man’s most sacred rights, one of his most valuable jewels and a constitutive element of dignity, morality, and the dowry which enhanced woman’s role.

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19 Joaquín Francisco Pacheco, El Código penal..., III, p. 170.
23 Ibidem, pp. 1707-1708.
24 Ibidem, pp. 1708-1710.
26 Record of Parliamentary Proceedings. Congress..., March 13th, 1848, No. 81, p. 1755.
27 Record of Parliamentary Proceedings. Congress..., session of March 16th, 1848, No. 84, p. 1819.