ISSN 2255-2707

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Citation

José Franco-Chasán, "Legislating for deviancy in the shadows: Treatment for dementes and locos from 1870 to 1931", *GLOSSAE. European Journal of Legal History* 20 (2023), pp. 144-178 (available at http://www.glossae.eu)

Legislating for deviancy in the shadows:
Treatment for *dementes* and *locos* from 1870 to 1931[*]

José Franco-Chasán[*]
University Rey Juan Carlos

ORCID ID:0000-0002-6860-480X

Received: 18.12.2022
Accepted: 03.04.2023

Abstract
The current article analyses the Spanish legislation regarding the treatment of insane offenders. In this normative study, various legal sources have been outlined: criminal codes, decrees, royal decrees, royal orders, ministerial orders, the War Navy Code, and the Code of Military Justice, among others. However, this approach tries to put legislation in context, since most of the evolution of the legislation is due to doctrine and case-law. Indeed, the fundamental change takes place in 1931, but this must be put into perspective and connected to the often forgotten, aforementioned sources of the law.

Keywords
Insane offenders, *dementes*, *locos*, alienated, criminal responsibility, dangerousness, forensic doctors, psychiatry, insanity, mentally ill, confinement

Summary: 1. Introduction. 2. Normative development. 2.1. Criminal Codes. 2.1.1. Criminal Code of 1870. 2.1.2. Criminal Code of 1928. 2.1.3. Criminal Code of 1932. 2.1.4. Criminal Code of 1944. 2.2. Complementary laws: royal decrees, decrees, royal orders, and ministerial orders. 2.2.1. The Royal Decree of 1885 (12th May): the Leganés Decree. 2.2.2. The Royal Decree of 1885 (19th May): State, provincial and municipal sanatoriums. 2.2.3. The Royal Order of 1887 (28th January): Petition of amendment. 2.2.4. The Royal Order of 1903 (26th November): clarification of art. 5. 2.2.5. The Royal Order of 1908 (25th March): De La Cierva Order. 2.2.6. The Decree of 1931 (3rd July): on the Assistance of the Mentally Ill. 2.2.7. The Ministerial Order of 1932 (16th May): on the Education of Psychiatric Nurses. 3. Specific jurisdictions. 3.1. War Navy Code. 3.2. Code of Military Justice. 4. Law and practice: the reality behind the application of the laws. 4.1. A change in society's mindset: doctrinal shift. 4.2. The case-law of the Supreme Court: struggling for authority. 5. Concluding considerations. Bibliographical references

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[*] This work has been undertaken in the context of the International GERN Seminar (*Groupe Européen de Recherches sur les Normativités*) organized by Yves Cartuyvels (University of Saint-Louis – Brussels, Belgium) and Aniceto Masferrer (University of Valencia, Spain) (2020-2022), the research project entitled "Tradición e influencias extranjeras en la Codificación penal española: contribución de la jurisprudencia en la evolución de la Parte Especial (1870-1995)" (PID2019-105871GB-I00), financed by the Spanish 'Ministerio de Ciencia e Innovación' (2020-2024), and the Belgian ARC Project AutonomiCap, L'autonomie à l'épreuve du handicap (mental), le handicap à l'épreuve de l'autonomie, 2019-2023 (https://autonomicap-usaintlouis.org/).

[*] Professor of Legal History at the University Rey Juan Carlos (Madrid). He obtained his PhD at the University of Valencia (cum laude and an international honour), where he obtained as well his Master in Human Rights. He worked as a researcher at the University of Augsburg (Germany) for three years. He has carried out several international research stays in Lausanne (Switzerland), Princeton (USA) and the Max-Planck-Institut (Frankfurt am Main, Germany). He worked at the University CEU Cardenal Herrera where he led the Department of Roman Law. Currently, he is working at the "Emerging Research Group in Spain and Spanish America: Five Centuries of Historical and Legal Relations" (University Rey Juan Carlos, EHCSRHJ) and in "The Alan Watson Group: the Making of the Western Law" (University of Valencia, WESTLAW).

1. Introduction

Spain's Criminal Code of 1870 attempted to adapt the Criminal Code of 1850 to the Constitution of 1869. Even if the code was a liberal one, many of the guarantees one could expect from the principles of the French Revolution were not exhaustively implemented in practice in the Iberian country. For instance, the judge's arbitrariness still played a predominant role and the limitation of the judiciary's discretion arising from the liberal era was far from governing in Spain. One of the great penalists of the history of Spain, Pedro Dorado Montero, held that due to this fact certain institutions (considered positivist and modern) could be implemented, regardless of if the Criminal Code of 1870 had not undergone "officially intended" positivist amendments or regardless of if institutions deriving from Social Defence were not approved. Even if such thing never happened at the theoretical level, Spain was able to apply it de facto. Officially, positivism hardly took off within legislation, but in practice the style in which the legislation was passed made this possible (art. 44, art. 10.1, art. 10.5, art. 9.6 or art. 76.5, among others). The treatment of the mentally ill, the mad-criminal or deviant people never followed the dictates of Social Defence. However, this was enshrined in the code as well:

> "When the imbecile or the mad person performed an act described as a crime, the court, according to the circumstances of the action, will issue his confinement in one of the hospitals devoted to those diseases."[1]

Not only did the Criminal Code of 1870 reflect this in practice due the aforementioned Spanish idiosyncrasy, but many other accessory laws,[2] judgements of the Supreme Court,[3] *circulares* of the Public Prosecution,[4] and military criminal codes did so (Spanish War Navy Code[5] and Code of Military Justice[6]).

In his 1876 work, Manuel Azcutia distinguished two categories when it came to insane offenders: *imbéciles* (imbeciles) and *locos*/*dementes* (mad criminals).[7] He highlighted "great differences" between them on the grounds of their "accountability."[8] The first was no more than a man "weak of spirit" who consequently held weak intellectual faculties, yet one "may not speak of a complete perversion of his judgement" neither of an "absolute lack of will, wickedness and freedom of action."[9] On its turn, the second one was the one who "became insane", who "absolutely lack[ed]s intelligence" and who could not "distinguish from good or evil."[10] Thus, the *demente-loco* individual was missing common sense, yet the one of the *imbécil* could not be said to have "entirely

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[1] Article 8.1 CC 1870.

[2] Vid. point 2 of the section 2 "Normative development".

[3] STS 916/1886, 05/04/1886 (Ponente: Miguel de Castells).

[4] Circular de la Fiscalía, 14/10/1889.

[5] Articles 10.3 and 10.12 of the *Código de la Marina de Guerra*.

[6] Article 173 of the *Código de Justicia Militar*.

[7] Azcutia, M., *La ley penal. Estudios prácticos sobre la interpretación, inteligencia y aplicación del Código de 1870 en su relación con los de 1848 y 1850, con nuestras antiguas leyes patrias y con las principales legislaciones extranjeras*, Madrid: Carlos Bailly-Baillière, 1876, p. 107.

[8] Azcutia, *La ley penal. Estudios prácticos…*, p. 107.

[9] Azcutia, *La ley penal. Estudios prácticos…*, p. 107.

[10] Azcutia, *La ley penal. Estudios prácticos…*, p. 107.

disappeared."[11] Even though further terminology was referred,[12] it should be noted that the imbecile and the mad criminal were terms which held a very different meaning.

Besides, the Criminal Codes of 1848, 1850 and 1870 addressed this topic on their article 8, with very little variations.[13] This provision stated that both imbeciles and mad criminals were exempted from criminal responsibility, unless they had acted in "lucid intervals."[14] However, when the imbecile or the mad criminal had carried out an act which the law considered as "serious", the Court would order his confinement in one hospital specialised for "their kind."[15] Yet, should the law foresee this as "less serious", the Court would opt out between the previous option and "handing him over to his family to take custody."[16]

2. Normative development

In this section, we will briefly address three Codes which are of relevant interest: 1870, 1928 and 1932. The selection is essentially due to the legislation of 1931, which put an end to the various revindications on the matter of insane offenders. All the psychiatric efforts during the previous years finally saw the results from this year onwards. Before that, experts largely complained about several aspects which ought to be amended, but the response of the legislature had either been negative or extremely mild to their pretentions. The decision to include the Francoist Criminal Code, which theoretically falls out of the proposed period, has been deemed necessary: it is vital to understand the evolution of this topic. Even if it was precisely in the early 1930's when the whole scenario finally changed, with the outbreak of the Spanish Civil War and the subsequent start of the dictatorship, new changes were introduced in Spain and the path which was starting to begin deviated once more. Cutting off the whole development in 1932 would, simply, leave us with a rather inaccurate picture.

2.1. Criminal Codes

2.1.1. Criminal Code of 1870

The Spanish Criminal Code of 1870 regulated insane offenders on its Chapter V ('On The Execution of Penalties and Their Enforcement') within the Title III ('On The Penalties'). Therefore, the institutions concerning both *locos* and *dementes* were located in the General Part of the Spanish system of Criminal law (Book I).[17]

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[11] Azcutia, *La ley penal. Estudios prácticos…*, p. 107.

[12] The terms "mentecato" or "tonto" were also duly analysed. However, they were not relevant for the thread.

[13] Both the CC 1848 and the CC 1850 simple considered that imbeciles and mad criminals were exempted from criminal responsibility, whereas the CC 1870 added that they did not commit a crime ("no delinquen"), which generated a heated debate among criminal law philosophers and criminal lawyers.

[14] Art. 8 CC 1848, 1850 and 1870.

[15] Art. 8 CC 1848, 1850 and 1870.

[16] Art. 8 CC 1848, 1850 and 1870.

[17] Note that the General Part is comprehended in Book I, and the Special Part is contained in Book II and in Book III.

On its Chapter V, both the execution of penalties and their enforcement were addressed. After stating article 100 that the execution of a penalty, its circumstances and conditions should not be others than the ones explicitly stated in the law, article 101 contained an exception regarding the case of insane offenders. When the criminal felt into madness (*locura*/*demencia*) or imbecility after a final judgement was ruled out, its execution would be stopped only as what concerned to the personal penalty.[18] At any time in which the criminal recovered sanity, he would serve the sentence, unless it had already prescribed. This should also be applied when the criminal became mad while he was serving the sentence.

Indeed, article 8.1 stated that the imbecile and the mad criminal (*loco*/*demente*) were exempted from criminal responsibility. There was an exception to it: "in case he had acted within an interval in which he enjoyed of reason."[19] Besides, probably as a result from the Social Defence influx back in that time, a special provision was foreseen: when the mad criminal/imbecile had carried out an act classified by the law as 'serious', the Court would issue his reclusion in one of the hospitals destined to them, out of which he would not be able to exit without the respective authorisation of the corresponding Court. However, in cases in which that action was deemed to be less serious, the Court would choose between the aforementioned decision or handing him to his family, providing they afforded enough deposit for the custody.[20]

Returning to the body of the article, should the criminal gain his mind back, he would serve the sentence unless it had already expired, in accordance with the provision of this Code. Additionally, the provisions contained thereof should be observed whenever the convict's madness or imbecility would newly appear while serving the sentence.[21]

Insane offenders were briefly addressed regarding their civil liability too. In Chapter II ('On the Civil Liability of People'), articles 18 and 19 provided the main aspects. Article 18 rendered the basics of civil liability: "every person holding criminal liability arising from a crime or misdemeanour, also accounts for its civil liability."[22] In case of insane offenders, the article 19 foresaw that the exemption of criminal liability stated that the previous article 8 did not encompass civil liability, which followed other rules. Firstly, the ones holding the custody would have civil liability for the actions carried out by: the mad criminal or imbecile, the minor under 9 years old, and the minor between 9 and 15 years old who had not acted with discernment.[23] If such person did not exist or he happened to be insolvent, then mad criminals, imbeciles and minors themselves would be liable with all their assets. Secondly, in the case 7º, the ones committing an unlawful act to prevent a greater evil were exempted from criminal responsibility, but the civil liability stemming from those acts would fall to the person who benefited from this action. The appreciation of this damage was calculated according to the judge's arbitrium. Thirdly, regarding the aspect 10º, the ones causing the fear would account civil liability.

[18] Article 101 CC 1870.
[19] Article 8 CC 1870.
[20] Article 8 CC 1870.
[21] Article 101 CC 1870.
[22] Article 18 CC 1870.
[23] Concerning cases 1º, 2º, and 3º of article 8.

2.1.2. Criminal Code of 1928

Specifically, in the Criminal Code of 1928, the General Part was comprehended in Book I, and the Special Part was contained in Book II and in Book III.

The liability of the mad criminal was repercussed in the responsible person holding the custody if they let the mad criminal wandering the streets.[24] The punishment consisted of an economic fine of 50 to 500 pesetas.

Additionally, should any physician issue a fake certificate or fake report as to which a "sane" person was addressed as a "mad criminal" and, thus, susceptible of treatment within an official or private mental asylum, then he would be punished with the penalty of 6 months to 3 years of imprisonment, and with a fine from 1.000 to 5.000 pesetas plus a special disqualification from 2 to 8 years.[25] However, the same penalty would be applied to those who had asked for the fake report, thoroughly knowing that what they were requiring was not true. Besides, if the people doing so were the parents, they would be punished with the civil inhabitation to exercise the custody.

2.1.3. Criminal Code of 1932

The general structure of the Criminal Code of 1932 was similar to that of the previous codes, at least in the sense that the General Part was comprehended in Book I, and the Special Part was contained in Book II and in Book III.

The most relevant mention to this respect was the recital of motives of the Criminal Code. In section V, the addressed topic was 'Humanisation and elasticity of the Code.'[26] Unsurprisingly, it referred to this as the "heart of the reform" of the Criminal Code of 1870. If the Code "had not been too harsh and rigid", in keeping with contemporary sensibilities, it could "have remained intact", as the technical reforms were not so urgent and those imposed by the new Constitution would have been easy to locate in a special law.[27] However, the Code, in force until now, could no longer prolong its life without "humanising it" and "making it more elastic", that is to say, without broadening the exonerating and mitigating factors, removing certain penalties, reducing punishments and making more room for the discretion of the judges.

For starters, the formula of irresponsibility contained in number 1 of article 8 was incompatible with the conceptions of modern psychiatry. The one finally adopted in the Criminal Code of 1932 has been proposed by Doctor Sanchis Banús. He was a Spanish physician who devoted his whole life to neuropsychiatry, who elaborated a

[24] Article 810 CC 1928.
[25] Article 379 CC 1928.
[26] Recital of Motives CC 1932.
[27] Recital of Motives CC 1932.

comprehensive work,[28] and who coined the "syndrome of Sanchis-Banús."[29] Thus, the conception held by this Criminal Code of 1932 was that of Dr Sanchis Banús. It covered not only "alienation", but also "transitory mental disorders."[30] In its own paragraph, it legislated on drunkenness, which had exempting effects when it occurred fully and due to a fortuitous cause. In this sense, the following were exempted from criminal responsibility:

"An insane person and a person who is in a state of transitory mental disorder unless this has been deliberately sought.

For drunkenness to be exempt from liability it must be full and fortuitous.

Where the insane person has committed an offence punishable by law, the Court shall order him to be committed to one of the hospitals intended for patients of that kind, from which he may not leave without the prior authorisation of the same Court."[31]

Furthermore, Spanish legislation warned of the situation when the offender felt into insanity "after the final judgment had been rendered."[32] Then, enforcement had to be suspended only in respect of the personal penalty. The provisions of the third paragraph of the article 8.1 would be observed in their respective cases. However, at any time when the offender regained his senses, he should serve the sentence, unless the penalty had prescribed, according to the provisions of this code. Additionally, should this mental alienation take place while the convicted person was serving the sentence, then the respective provisions of this Section should also be observed.

On the other hand, Chapter II should also be explored since it dealt with the people holding civil responsibility for crimes and misdemeanours. Two main aspects of this content had to be outlined. The general rule was that any person who was criminally liable for a crime or misdemeanour was also civilly liable.[33] Nevertheless, exemption from criminal liability declared in numbers 1, 2, 3, 7 and 10 of Article 8 did not include exemption from civil liability.[34] It should be effective when observing the following rules.

In cases 1, 2 and 3, those who had either the alienated person, the minor under sixteen years of age or the deaf-mute under their power or legal guardianship were civilly liable for the acts performed by them, unless it was established that there was no fault or

[28] Autor de un prólogo de la versión castellana del libro de Oswald Bumke: *Lehrbuch der Geisteskrankheiten. Die Anatomie der Psychosen* (Bumke, O., *Tratado de las enfermedades mentales*, Barcelona: Francisco Seix, 2º ed., 1941, 1246 pp.). Asimismo, autor de otras obras de relevancia tales como: Sanchis i Banús, J., *Fisiopatología general de las sensibilidades especiales: olfato y gusto*, Madrid, 1926; Sanchis i Banús, J., *Estudio médico-social del niño golfo*, Universidad Central de Madrid, Valencia: Tip. Excelsior, 1916, 124 pp.; Sanchis i Banús, J., "Nueva contribución al estudio de la afasia: con motivo de un caso de supuesta 'sordera verbal pura'", *Revista médica de Barcelona*, Barcelona, 1925, 11 pp.; Sanchis i Banús, J., Abaunza, A., *Psicogenia de los celos, lo masculino y lo femenino, los médicos y la sociedad, el psicoanálisis y el arte*, Madrid y Buenos Aires: Ediciones Ulises, 1º ed., 1930, 230 pp.

[29] It is said to be a paranoid reaction that occurs in situations of sensory deprivation, and which is based on a dispositional or characterological basis in subjects with insecure traits. Vid. Carrión-Expósito, L., Bancalero-Romero, C., Hans-Chacón, A., et al., "Delirio paranoide de los ciegos (síndrome de Sanchís-Banús)", *Psiquiatría Biológica*, Volume 19, Issue 3, July–September 2012, pp. 95-98, https://doi.org/10.1016/j.psiq.2012.07.004.

[30] Recital of Motives CC 1932.

[31] Art. 8.1 CC 1932.

[32] Article 86 CC 1932.

[33] Article 19 CC 1932.

[34] Article 20 CC 1932.

negligence on their part. If there was no person who had them under his authority or legal guardianship, or if that person was insolvent, the alienated, minors or deaf-mutes should be liable with their own property, within the limits that the law of civil procedure established for the seizure of property. Unsurprisingly, it was virtually the same content as the ones in articles 18 and 19 of the Criminal Code of 1870.

Little did this conception evolve in the last 200 years, since the Spanish academia had attempted to stay in some sort of *Terza Scuola* since the beginning of the great debate of criminal law schools. This positioning seemed to influence on the topic of insanity and the relation between reason and madness too. As the Hegelian expert, professor Berthold-Bond, rightly indicated, Hegel developed a third way between 'somatic and psychical practitioners', i.e. between the 'empirical and romantic' medicine.[35] So, even if the Hegelian view of madness as a return to a pre-rational state of being was not a very precise manner to depict the Spanish sphere of 19th criminal law,[36] health and madness were not conceived as extremes. Thus, both rationality and insanity were presented as holding a strong reciprocity. In Spain, a similar approach to this issue was adopted when dealing with how to address mental illnesses: as functional medical models or as a social label which helped to govern society.

2.1.4. Criminal code of 1944

In the Criminal Code of 1944, there were no major changes. The most relevant change could be found right in the middle of the four criminal codes. The CC 1870 and CC 1928 spoke of *locos* and *imbéciles*, whereas the CC 1932 and the CC 1944 referred to the "alienated" or the ones suffering from "transitional mental disorder".

Other than that, the content of the criminal code touched the same points as the previous one. First, there was the exemption from criminal responsibility to the "alienated person" and the person who was in a situation of "transitory mental disorder" (unless this latter had been sought on purpose to commit a crime).[37] When the insane person had committed an act punishable by law as a crime, the Court should order him to be "placed" in one of the hospitals intended for "patients of that kind."[38] Secondly, those in charge of the custody or guardianship of an alienated person who allowed him to "wander in the streets or public" places without "due supervision" should be punished with a fine of 25 to 250 pesetas and a private reprimand.[39] In the last place, there was a provision in case the offender became insane "after the final judgement had been pronounced."[40] At any time when the offender came to his senses, he should serve the sentence, unless the penalty was time-barred in accordance with the provisions of this Code. The respective provisions of this section should also be observed when the alienation occurred while the convicted person was serving the sentence.[41]

[35] Berthold-Bond, D., *Hegel's Theory of Madness*, New York: State University of New York Press, 1995, 334 pp.

[36] Especially, when he was depicting Hegel's theory of madness within the history of psychiatric practice during the great reform period at the turn of the 18th century.

[37] Art. 8.1 CC 1944.

[38] Art. 8.1 CC 1944.

[39] Art. 580 CC 1944.

[40] Art. 580 CC 1944.

[41] Art. 82 SCC 1944.

2.2. Complementary laws: royal decrees, decrees, royal orders, and ministerial orders

Out of the Criminal codes, a more flexible legal reality developed in Spain, directly affecting institutions and criminal and mental health facilities. There were several legal instruments that forced major changes in the legal system concerning insane offenders. Those changes were led by professionals and by the doctrine. However, more often reality comes first and the law is just a regulation of the previous, human reality. That statement, which can be applied to human rights and to foral laws in Spain, can be applied to the regulation of insane offenders too. The truth is that before regulation there was a movement which started shaping this regime for *dementes* and *locos*. The initiative to do so was long overdue to the creation of the Spanish Association of Neuropsychiatrists, which took place in 1924 in Barcelona. Yet, the relevant data regarding thereof were not easily found and there was nor a “single work or document” which gathered in a “complete and precise manner” the list of conferences organised by the Association throughout its history, neither an “overview of its successive executive boards.”[42] Furthermore, there was no historical archive of the Association, not even a complete collection of its basic documents.[43] Be as it may, the reader might find loose references throughout this section, provided that this was probably the main engine behind those legal amendments.

2.2.1. The Royal Decree of 1885 (12th May): the Leganés Decree

Leaving aside the Criminal code, this royal decree was the first piece of legislation dealing with the mentally ill in Spain.[44] It was published on 12th May 1885, and it was known as the Leganés Decree because it contained the legal regime of the sanatorium “Santa Isabel” which was located in Leganés (Madrid), later used a model.

The organic regulation thereof was considered as a “general charity establishment” by means of a previous royal decree of 1st November 1852. The main objective of the institution was to “look after the alienated individuals” and to “procure a medical treatment.”[45] However, they distinguished between “poor people” and the ones “paying for the service.”[46]

The Chapter II (Board of Trustees) and Chapter III (Personnel) held no particular interest. In the first one, the functions of the Board of Trustees were listed. In the second one, more diverse employees were foreseen: the manager trustee, the commissioner-controller, the porter, the outside guard, the orderly, the nurses and the maids, the practitioner, the barber, the doctors and medicine professors, the chaplain, and the religious order “Daughters of Charity”. Those 3 latter were remarkably central to the institution since they held very specific duties directly related to the well-being and

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[42] Lázaro, J., “Historia de la Asociación Española de Neuropsiquiatría”, *Revista de la Asociación Española de Neuropsiquiatría*, No. 75, vol. XX, 2000, pp. 397-515, en particular vid. p. 398.

[43] Lázaro, “Historia de la Asociación Española de Neuropsiquiatría”, p. 398.

[44] “Real decreto aprobando el reglamento orgánico del Manicomio de Santa Isabel de Leganés”, *Gaceta de Madrid*, No. 135, de 15/05/1885, páginas 447 – 450, Departamento: Ministerio de la Gobernación, enlace: https://www.boe.es/datos/pdfs/BOE/1885/135/A00447-00450.pdf.

[45] Art. 2 “RD aprobando el reglamento orgánico del Manicomio de Santa Isabel …”, p. 448.

[46] Art. 3 “RD aprobando el reglamento orgánico del Manicomio de Santa Isabel …”, p. 448.

treatment of the mentally ill. The doctors and medicine professors established the regime, prescribed the adequate medication, issued health certificates, informed the Board of Trustees whenever the recovery of a patient had been produced, determined which patients required hospitalisation, decided when a patient was ready to receive a visit, conducted a general registry of insane patients,[47] and carried out a general visit to all patients.[48] The chaplain would administer the sacraments, but also "cooperate" with the doctors and medicine professors to "achieve the success" of the "moral treatments" prescribed by the doctors.[49] This was controversial from the point of view of professional deontology. Further on, the "Daughters of Charity" contributed with the general well-being of the patient by taking care of their "grooming", "washing", "sewing" and "ironing" their clothing, "cooking" and "administering" the resources they received (such as food, groceries, goods or furniture).[50]

The admission to the mental hospital was governed by the provisions within Chapter IV ("Admission") and Chapter V ("Temporal and definitive discharge"). Regarding the admission, it was issued by the Director of the establishment. It required an application, information brought before the judge of the court of first instance detailing his state of dementia and his need for confinement. This application should be filled in by the spouse, relative or major of the village. The requirements were rather bureaucratic to the extent that poor people were asked a certificate on behalf of the city hall to attest their economic situation.[51] As the establishment was left with vacancies, the next in the waiting list would access the institution: such list was at the notice board at the porter's lodge.[52]

Concerning the discharge, the document started addressing the temporary one. It could take place whenever the doctor prescribed so "as a recommendation" or when the relative/guardian "asked so."[53] Naturally, once the temporary period was over, the vacancy would be assigned with the next mentally ill in the waiting list. Therefore, if the former patient had not presented himself in following day of the end of the leave, or if he had not proven the excusable impossibility of doing so, he would lose his place at the mental hospital.[54] For the definitive discharge, the proceeding was a bit more complex. It was necessary that the Chief Medical Officer had stated in the medical record that the person had been cured. Then, the Board of Trustees would inform the General Directorate, proposing his "discharge", and once this had been agreed upon by aforementioned institution, then the local administration "would notify" the interested persons, the Court or the military authority which had requested it.[55] Also, the regulation foresaw a very specific circumstance: if the mentally ill had "finally healed", yet none of his relatives had applied for his release from the sanatorium "nine days after the Manager had informed about it", he would be placed at the mayor's disposal and sent to his village of origin.[56]

[47] Art. 13 "RD aprobando el reglamento orgánico del Manicomio de Santa Isabel …", p. 448.
[48] Art. 14 "RD aprobando el reglamento orgánico del Manicomio de Santa Isabel …", p. 448.
[49] Art. 20 "RD aprobando el reglamento orgánico del Manicomio de Santa Isabel …", p. 448.
[50] Arts. 31-32 "RD aprobando el reglamento orgánico del Manicomio de Santa Isabel …", p. 448.
[51] Art. 55 "RD aprobando el reglamento orgánico del Manicomio de Santa Isabel …", p. 449.
[52] Art. 58 "RD aprobando el reglamento orgánico del Manicomio de Santa Isabel …", p. 449.
[53] Art. 59 "RD aprobando el reglamento orgánico del Manicomio de Santa Isabel …", p. 449.
[54] Art. 61 "RD aprobando el reglamento orgánico del Manicomio de Santa Isabel …", p. 449.
[55] Art. 62 "RD aprobando el reglamento orgánico del Manicomio de Santa Isabel …", p. 449.
[56] Art. 63 "RD aprobando el reglamento orgánico del Manicomio de Santa Isabel …", p. 449.

To conclude, there were left some relevant aspects to highlight. There were a set of prices for the stay, but the poor patients "were exempted" from its payment.[57] There were certain guidelines regarding the information of the "records" and the "internal rules" of the establishment,[58] as well as concerning the "clothing" (only differing between men and woman),[59] and the "meal plan" (differing between poor people and the patients paying for their stay).[60] In relation to visits, even if restrictive towards alien people, a general norm was conceived:

> "…under no pretext shall the ill person be forbidden to visit his or her spouse, parents, guardian, curator or siblings whenever the Head Physician so requests, observing such precautions as he deems appropriate, and subject to his consent."[61]

Besides, the employees were banned from bringing letters to any patient and from holding any conversation that could alter his mental state.[62] Strictly speaking from the legal point of view, when the Courts of Justice declared a prisoner to be "irresponsible" on the grounds of "proven insanity", and ordered him to be confined in this asylum, he should be granted the corresponding admission, subject to the sending of a "copy of the judgement."[63] Thus, the Administrator of the establishment would notify the Court when it was appropriate to admit the insane person. Essentially, no insane person of this class may be released after he had been cured "without first notifying the Court that referred him."[64]

2.2.2. The Royal Decree of 1885 (19th May): State, provincial and municipal sanatoriums

Commonly referred to as the "Romero Robledo Royal Decree",[65] this Decree aimed at the regulation of the "admission" to mental hospitals of the mentally ill.[66] The main criticism to this instrument was its main concern: it excessively focused on preventing the confinement of sane individuals. It protected individual freedom with particular care, but this caused it to neglect the interest of the mentally ill. It was undeniable that it constituted a very guarantist legislation, but the effective recovery of the patient was often overlooked. It was a product of its time: after the French Revolution, individual liberties should always be protected. However, the enormous amount of both

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[57] Arts. 66-70 "RD aprobando el reglamento orgánico del Manicomio de Santa Isabel …", p. 449.
[58] Arts. 71-74 "RD aprobando el reglamento orgánico del Manicomio de Santa Isabel …", p. 449.
[59] Arts. 75-77 "RD aprobando el reglamento orgánico del Manicomio de Santa Isabel …", p. 449.
[60] Arts. 80-86 "RD aprobando el reglamento orgánico del Manicomio de Santa Isabel …", p. 449.
[61] Art. 95 "RD aprobando el reglamento orgánico del Manicomio de Santa Isabel …", p. 450.
[62] Art. 103 "RD aprobando el reglamento orgánico del Manicomio de Santa Isabel …", p. 450.
Bear in mind that the original expression used in Spanish was "moral state" and not "mental state". I translated it as to make it easier for the reader to understand it. Yet, this dichotomy between the mind and the morality has a deeper explanation and is preceded by further debates which exceed the extent of this article.
[63] Art. 106 "RD aprobando el reglamento orgánico del Manicomio de Santa Isabel …", p. 450.
[64] Art. 106, "Real Decreto 12 de mayo de 1885".
[65] Since it was enacted by Francisco Romero Robledo (1838-1906), a Spanish lawyer and politician who served as the former Minister of Justice of Spain.
[66] "Real decreto dictando reglas para la admisión de dementes en los establecimientos de beneficencia", *Gaceta de Madrid*, No. 141, de 21/05/1885, p. 511, Departamento: Ministerio de la Gobernación, enlace: https://www.boe.es/datos/pdfs/BOE//1885/141/A00511-00511.pdf.

formalities and bureaucracy could prevent the system to properly fulfil its initial objective of healing people:

"The formalities required for the patient's admission to the asylum constitute an accumulation of obstacles that extraordinarily delay his hospitalisation and, therefore, the application of the appropriate treatment."[67]

It was published on 19th May 1885 and its initial concern was to guarantee the individual security, so that nobody would be confined without the proper information being first cleared before a judge. Unfortunately, since the publication of the "Law of Charity" on 20th June 1849,[68] and its subsequent regulation for its execution of 14th May 1852,[69] the Government was not able to create more hospitals for the insane holding the same nature as that of Leganés (Santa Isabel),[70] which was naturally insufficient to house the growing number of alienated persons that there were in the whole of Spain. For this reason, such task fell into the several Provincial Councils, Town Councils and private individuals. They were responsible for a large number of insane persons who entered into confinement without any effective guarantee of individual security. Henceforth, litigation and even criminal proceedings were frequently instituted for the wrongful confinement of persons: those not judicially declared to be insane.

The Decree came to light after having consulted several grounded opinions such as the Royal Academy of Medicine, the Royal Council on Healthcare, the relevant sections within the Ministry of Governance and the Ministry of Justice. Similarly, to the previous decree, there were two ways of admission: observation or definitive confinement. The mentally ill were interdicted to be admitted in observation in general establishments of charity. They could perfectly be included in the provincial, municipal and particular ones.[71] The requirement to be admitted was the application of the closest relative justifying his need by means of a medical certificate (issued by a doctor and supervised by the mayor). The admission could either be public or private. In the first one, the local councils should take care to provide with suitable conditions for the confinement of insane persons under observation, where they may remain until they were taken to an insane asylum as permanent inmates. In the second one, they would have to be subject to the special regulations which the Government would prior elaborate:

"Private individuals or associations supporting or founding an establishment for the purpose of providing a home for the insane shall submit their respective regulations to the Government for approval and shall operate in accordance with the provisions thereof."[72]

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[67] Sacristán, J. M., "Para la reforma de la asistencia a los enfermos mentales en España (1921)", *Revista de la Asociación Española de Neuropsiquiatría*, Vol. 20, No. 75, 2000, pp. 519-529, en particular vid. p. 520.

[68] "Ley sancionada sobre establecimientos de beneficencia", *Gaceta de Madrid*, No. 5398, de 24/06/1849, pp. 1-2, Departamento: Ministerio de la Gobernación, enlace: https://www.boe.es/datos/pdfs/BOE//1849/5398/A00001-00002.pdf.

[69] "Real decreto mandando se observe el reglamento de la ley de beneficencia de 20 de junio de 1849", *Gaceta de Madrid*, No. 6537, de 16/05/1852, pp. 2-4, Departamento: Ministerio de la Gobernación, enlace: https://www.boe.es/datos/pdfs/BOE//1852/6537/A00002-00004.pdf.

[70] The Ministry had invoked an economic cause: namely, the distressing situation of the public treasury.

[71] Art. 2 "Real decreto dictando reglas para la admisión…".

[72] Art. 10 "Real decreto dictando reglas para la admisión…".

In the moment in which this decree was passed, the responsible establishments had a deadline of one month to present to the Ministry of Governance their respective internal regulations in order to obtain the corresponding approval.[73] Be as it may, there was an incompatibility that had to be served: the Medicine Professors who issued the certificate expressing the state of the patient "may not be related within the fourth civil degree" to the "person making the request", to the "Administrative Director" or to "any of the doctors" of the establishment in which the observation was to be carried out. Besides, the Directors of the establishments were obliged to inform the Governor of the respective province or the mayor, depending on whether the asylum was located in the capital of the province or in one of its towns, within three hours of the admission of the allegedly "alienated person."[74]

Observation, without other requirements than those already mentioned, may only be consented once: if, at any time, the person who had been subject to it should again show symptoms of insanity, it should be indispensable, in order to submit him again to observation, to institute again the appropriate judicial proceedings.[75] About this, Sacristán criticised that even the coming decrees (like "De La Cierva" Decree) would even further "hinder" the "rapid hospitalisation" that many "psychoses" required.[76] It was precisely this "fear" of violating the law, or committing an arbitrary act against the law, the reason why the judicial criterion usually prevailed over the medical criterion:

"For the definitive admission of an insane, the case must be brought before the judge of first instance, in which the illness and the necessity or convenience of the confinement are justified."[77]

Moreover, a great additional concern inspired the main objective of this decree. They were afraid that members of the same family who attempted to inherit or administer the goods and assets of a rich member would intentionally and deceitfully get this person in the sanatorium. To plainly pose it, they were worried that those establishments could misguidedly "kidnap" sane people. The current decree addressed such concern and reminded that they should be "subject to liability" under the "Criminal Code" if they ever committed a misdemeanour or the offence of "abduction."[78]

Nevertheless, there were more aspects which were considered as suboptimal and improvable. A good example of it was the preposterous time frame which was devoted to "control visits" made by the mayors or Medical Subdelegates:

"They shall inform to the respective Governor about what they have observed and what deserves to be corrected on the *same day* on which they carry out the visits."[79]

Besides, this entailed that they were arranged appointments beforehand. Giving time to prepare those visits did not seem the most objective manner in which a supervision

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[73] As contained in the "Additonal Provision" of the "Real decreto dictando reglas para la admisión de dementes en los establecimientos de beneficencia".

[74] Art. 3 "Real decreto dictando reglas para la admisión…".

[75] Art. 4 "Real decreto dictando reglas para la admisión…".

[76] Sacristán, "Para la reforma de la asistencia…", p. 520.

[77] Art. 7 "Real decreto dictando reglas para la admisión…".

[78] Art. 11 "Real decreto dictando reglas para la admisión…".

[79] Art. 12 "Real decreto dictando reglas para la admisión…".

was to be carried out. On the contrary, concerning the treatment of the army personnel, it was the responsibility of the Minister of the Interior to authorise the confinement of individuals of the Army to the ones "having lost their reason."[80] The so-called "military jurisdiction" had ceased with respect to them, and thus, they remained subject to the same procedures established by the civil jurisdiction for their admission to the asylums.[81] However, if they ever came to their senses, they could perfectly come back to the Army.[82]

2.2.3. The Royal Order of 1887 (28th January): Petition of amendment

The Royal Order of 1887 studied whether a reform should be operated in the current way of dealing with the confinement of the mentally ill.[83] Essentially, this Royal Order of 1887 rejected an application made by several Medical Directors and owners of private asylums who requested the amendment of the Royal Decree of 19th May 1885 on the observation and confinement of the insane. The two main points which were tackled were the periods of observation and definitive confinement, and the fact that for the confinement of wealthy individuals it should only be required the application of the closest relative plus a medical certificate of its *vesania* state.[84] For them, the text of the aforementioned decree of 19th May 1885 considered sanatoriums, other minor mental establishments and the doctors of the mentally ill to be nothing but "mere kidnappers" or "abductors", since it should not be possible to "confine any person without reason in private asylums" simply due to the "freedom" that "alienated persons" enjoyed there.[85]

A couple of additional questions were raised in that original report, namely four. First, that the former decree authorised the admission of up to 4 insane offenders in particular houses "without any particular requirement" (which, theoretically, makes "kidnapping" easier). Second, that by means of asking for the judicial record, the admission of the insane in particular sanatoriums was postponed, thus, delaying the adequate treatment for the insane. In turn, this would go against the will of the families to "keep the secret" on the condition of their family member. Third, it was not easy to determine the duration of the dementia: it could be less or more than the 3 to 6 months that was established in the decree of 19th May 1885. Fourth, there were remittent or intermittent insanities (including 'circular insanity'), in the course of which there were periodic intervals of varying lengths of lucidity, during which the patients may remain at home, only to return to the asylum when a new onset occurred. Since with each relapse, a new case should be brought to court, this requirement was not only cumbersome but rather impossible to fulfil in modern asylums.

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[80] Art. 14 "Real decreto dictando reglas para la admisión…".

[81] Art. 15 "Real decreto dictando reglas para la admisión…".

[82] Art. 16 "Real decreto dictando reglas para la admisión…".

[83] "Real orden desestimando una instancia de varios Médicos Directores y propietarios de manicomios particulares en que pedían la reforma del Real decreto de 19 de Mayo de 1885 sobre observación y reclusión de dementes", *Gaceta de Madrid*, No. 29, de 29/01/1887, pp. 296-297, Departamento: Ministerio de la Gobernación, enlace: https://www.boe.es/datos/pdfs/BOE//1887/029/A00296-00297.pdf.

[84] Latin term for the words "insanity", "madness" or "rage".

[85] Recital of motives, "Real orden desestimando una instancia de varios Médicos Directores y propietarios de manicomios…".

The sections of the Ministry of Governance and the Ministry of Justice, after reading the application, rejected it on various grounds. For starters, there were many establishments in which even the doctor's certification was not even de facto required, what usually led to problematic litigation processes for having admitted to the sanatorium individuals who had not been previously judicially declared as such. On the other hand, what the applicants were asking for was considered as nothing but a privilege for the wealthy patients. It was rejected due to breaking the principle of equality before the law.[86] The royal order particularly highlighted that if any exception was to be made, it should always be done in favour of the "miserable" who lacked any "gifts of fortune",[87] so that their admission to the sanatoriums would be easier and with less associated costs: never in the benefit of wealthy individuals.

"It is precisely regarding the issue of secluding wealthy people that the provisions of the former [law] must be complied with most rigorously, because as a general rule it is the greed for the enjoyment of other people's property that leads to the commission of the repugnant crime of passing off as insane someone who enjoys the fullness of his intellectual faculties."[88]

Besides, the family's wish to keep the secret was simply an argument that did not deserve to "be taken into account": individual safety could not be subjected to such "puerile scruples". Furthermore, "bringing the case to the Court" would not endow it of publicity: such thing could only happen when the relatives, friends or employees gossiped with other people.[89]

Whereas the Royal Council of Healthcare directly recommended to dismiss their application, the Royal Academy of Medicine agreed to operate three major reforms to partially meet the expectations of the applicants. In the first place, in the very obscure and difficult cases of various forms of mental alienation, the six-months period could be prolonged up to a twelve-months period.[90] In the second place, there was an urge for the clear distinction with a special lettering of the two different sections within a sanatorium: distinguishing "observation" from "definitive stay."[91] In the third place, particular houses for the insane (up to 4 people) should be properly conditioned. There should be a special, isolated department for such patients, which should be provided with the necessary hygienic conditions and be equipped with all the means and resources for the healing of mental diseases.

The Commission highlighted that the provisions of the aforementioned royal order established prudent requirements that prevented to confine "as alienated" perfectly sane people. On the other hand, it was not true that the Royal Decree authorised the admission

[86] "Real orden desestimando una instancia de varios Médicos Directores y propietarios de manicomios…", p. 297.

[87] It was a pretty old expression which in Spanish read as "bienes de fortuna", which can be essentially translated to contemporary Spanish as "economic means" (thus, including goods, money, property, etc.).

[88] "Real orden desestimando una instancia de varios Médicos Directores y propietarios de manicomios…", p. 297.

[89] In this assertion, the Commission was rather bothered by the arguments of this group of doctors, and from that text one could sense the tension between the two positions.

[90] In practice, this meant to modify the article 6 of the Royal Order of 19 May 1885: from 6 to 12 months.

[91] Real orden desestimando una instancia de varios Médicos Directores y propietarios de manicomios…", p. 297.

and stay of four insane in private homes without “any requirement whatsoever”, since the precept contained in Article 3 included all establishments, whatever their type was.[92]

This assertion by the interested parties was surely born of the erroneous way in which they interpreted the fifth and sixth paragraphs of art. 3 of the Royal Decree. The first of these referred exclusively to public asylums, and the second, as can be seen in the opinion of 17th April 1885, covered both private asylums, properly speaking, and the so-called ‘houses of cure’, in which only four alienated persons could be housed.

The solely difference that the Royal Decree constituted between the two establishments was that it exempted the latter, that was to say, the houses of cure, from the obligation to present their special regulations to the provincial government, an exception that seemed justified given the small number of insane persons they could host. Besides, the Commission reminded that in the article 4 of the former decree the admission to observation without requirements could only take place once. In case the mentally ill had another symptom of dementia, then the case should be newly brought to court. The main concern of the Commission to this respect was that if such condition did not take place this period of observation could fall in the category of “indefinite” when it should always be “temporary.”[93]

In a nutshell, the Commission stressed the fact that general establishments of charity were devoted to satisfying the needs of a permanent nature, so they should not be aimed at the mentally ill who were in observation (precisely what the Royal Decree of 19th May 1885 held). Otherwise, their very main objective would be distorted.

Finally, the General Director of Charity concluded by asking that this set of conclusions were put together in the form of a Royal Order, so as to clarify once for all that the Royal Decree of 19th May 1885 did not require in any manner an amendment.

2.2.4. The Royal Order of 1903 (26th November): clarification of art. 5

The Royal Order of 1903 consisted of a clarification,[94] and it was rather brief (with only 6 short paragraphs). The Subdelegate of Medicine brought the issue on how should article 5 of the Royal Decree of 19th May 1885 be interpreted. Essentially, the article established that the admission in sanatoriums of those mentally ill in ‘observation’ could not be permitted: only in the cases of true and notorious urgence, so declared by the mayor or the Subdelegate of Medicine himself. This latter, who raised the petition, manifested that within his “16 years of experience” he had never been asked for it nor had he been commanded to issue a report on them. For 16 years he had only been required to give his “agreement” or “greenlight” to the signatures of the “certificates presented by the

[92] Real orden desestimando una instancia de varios Médicos Directores y propietarios de manicomios…”, p. 297.

[93] Real orden desestimando una instancia de varios Médicos Directores y propietarios de manicomios…”, p. 297.

[94] “Real orden confirmando nuevamente lo dispuesto en el art. 5.º del Real decreto de 19 de Mayo de 1885 respecto al ingreso de alienados en los Manicomios”, *Gaceta de Madrid*, No. 331, de 27/11/1903, p. 749, Departamento: Ministerio de la Gobernación, enlace: https://www.boe.es/datos/pdfs/BOE//1903/331/A00749-00749.pdf.

doctors."[95] Therefore, given that this part of the law was not being fully met, the interested party asked for the creation of a royal order as to clarify whether this had "fallen in disuse" and whether this should be "of application" in all mental asylums.[96]

The answer of the Royal Order of 1903 was quite inflexible and less of a clarification. It pointed out that nor had the referred legislation been amended, neither had it fallen into disuse. It was in force "in every single part of the law" and so it had to be "abided in everything it prescribed."[97] Its main goal was to "avoid" the reclusion of individuals who "did not meet all the requirements of the mentally ill", even if it was only "in observation."[98] Besides, this went in favour of the citizens, because in case someone was mentally ill, his "suffering" could only be "exacerbated" with the "unnecessary regime" of the sanatoriums.[99]

Finally, the conclusions were two. On the one hand, that the Royal Decree of 19th May 1885 compelled the Subdelegates of Medicine and the mayors to issue "reasoned reports" on the "true urgence and need" of confining the mentally ill.[100] On the other hand, that such provision should be applicable to all the mental hospitals in Spain, regardless of the "nature" and the "funds" thereof.[101]

2.2.5. The Royal Order of 1908 (25th March): De La Cierva Order

Also known as "De La Cierva Royal Order",[102] it did nothing but to "obstruct even more" the "rapid hospitalisation" of the "numerous existing [types of] existing psychosis."[103] According to the experts in the field, far from making things easier for the doctors, professionals and the mentally ill themselves, it focused even more to protect the formal aspects of the procedure and to protect the individual liberties at the expense of a more effective and fast treatment for the insane.

This order started by stressing out that the need to confine the mentally ill within the sanatoriums had to be conducted within the "limits of prudence" and it had to include "as many legal and moral provisions" as it could.[104] This legislation tried to adopt a

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[95] "Real orden confirmando nuevamente lo dispuesto en el art. 5.º del Real decreto de 19 de Mayo de 1885…", p. 749.

[96] "Real orden confirmando nuevamente lo dispuesto en el art. 5.º del Real decreto de 19 de Mayo de 1885…", p. 749.

[97] "Real orden confirmando nuevamente lo dispuesto en el art. 5.º del Real decreto de 19 de Mayo de 1885…", p. 749.

[98] "Real orden confirmando nuevamente lo dispuesto en el art. 5.º del Real decreto de 19 de Mayo de 1885…", p. 749.

[99] "Real orden confirmando nuevamente lo dispuesto en el art. 5.º del Real decreto de 19 de Mayo de 1885…", p. 749.

[100] "Real orden confirmando nuevamente lo dispuesto en el art. 5.º del Real decreto de 19 de Mayo de 1885…", p. 749.

[101] "Real orden confirmando nuevamente lo dispuesto en el art. 5.º del Real decreto de 19 de Mayo de 1885…", p. 749.

[102] "Real orden referente á la reclusión de dementes en los Manicomios oficiales ó casas de curación", *Gaceta de Madrid*, No. 154, de 02/06/1908, p. 1053, Departamento: Ministerio de la Gobernación, enlace: https://www.boe.es/datos/pdfs/BOE//1908/154/A01053-01053.pdf.

[103] "Real orden referente á la reclusión de dementes en los Manicomios…", p. 1053.

[104] "Real orden referente á la reclusión de dementes en los Manicomios…", p. 1053.

conciliatory, kinder tone in its wording just to reassert his opposition to a more open draft of the law. On the one hand, they acknowledged that urgent admissions to hospitals could not be "hindered" by bureaucratic provisions, yet the "generous facilities" provided by the Government to the families should not be used to "legalise the most hateful of all forms or abduction."[105] They acknowledged that it was not admissible that in cases of paroxysm ("as dangerous to the neighbourhood as it was to the mentally ill himself") an "immediate hospitalisation" was prevented.[106] That being said, the rest of the order insisted on the need for those obstacles:

> "But insanity in its many degrees has indeterminate, nebulous boundaries, and reasonable appearances that cannot be defined in the most summary procedure. Hence, medical science, in its official collaboration with the legislator, advised establishing in insane asylums a sufficiently long period of observation so that the competent court could eventually endorse the alienist's diagnosis without hesitation and in full awareness."[107]

Even Sacristán, within a posterior work, acknowledged this immobility of the system: to a certain extent, legal measures that "guarantee individual freedom" are fine, but they "must never, under any circumstances, hinder the psychiatrist's work."[108]

Moving on, the Royal Decree of 19th May 1885 foresaw a period of three months (as a general rule) or six months (as an exception for doubtful cases). Nevertheless, the Royal Order of 28th January 1887 extended this period to one year. But when such concessions were made to provincial, municipal and private establishments, as well as when they were extended to general charitable establishments,[109] strict restrictions and foresighted rules were imposed for the use of this exceptional period. The reason behind this was much simple: since dispensing with judicial proceedings for peremptory reasons was a measure favourable to society as a whole, it also opened the way to subterfuge. There was a risk that charitable work in protective functions may prove to be a cover for "iniquitous attacks against freedom."[110] Indeed, the main concern was that many families, who obtained the temporary admission of the mentally ill, did not carry out the legalisation of the situation thereof. This happened either because they forgot of their duty (since they became free from the "risk" or "discomfort" of living together with the insane) or because they wanted to "elude" all the economic costs that a "judicial proceeding" may bring to them.[111] In practice, this entailed the case, as "sensitive" as "intolerable" as it may be, that individuals spent "years and years in observation", even though their "incapacity" had not been "completely established."[112] Even if still far from what the experts advised to modernise the system, the control of the institutions was increasingly growing, and progressively it stopped being something which could be dealt within private homes:

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[105] "Real orden referente á la reclusión de dementes en los Manicomios…", p. 1053.

[106] "Real orden referente á la reclusión de dementes en los Manicomios…", p. 1053.

[107] "Real orden referente á la reclusión de dementes en los Manicomios…", p. 1053.

[108] Sacristán, "Para la reforma de la asistencia…", p. 522.

[109] By the Royal Decree of 30th April 1895.

[110] "Real orden referente á la reclusión de dementes en los Manicomios oficiales ó casas de curación", p. 1053.

[111] "Real orden referente á la reclusión de dementes en los Manicomios…", p. 1053.

[112] "Real orden referente á la reclusión de dementes en los Manicomios…", p. 1053.

"Those mentally ill that have remained more than a year in observation in whatever sanatorium and that, according to the Head of Physicians, ought not to be discharged, will be subject to an ex-officio case record [an administratively initiated case] before the judicial authority in order to either legalise his continuation within the mental asylum or to promote his leave."[113]

Finally, a relevant remark had to be considered: the Teutonic influence. The German impact within the construction of the Spanish system was decisive.[114] Psychiatry in Spain found itself blatantly underdeveloped. Even if some cities remained central to this issue, such as Madrid,[115] Barcelona,[116] or Valencia,[117] the rest of the country witnessed a discipline close to complete inexistence. At the time when José Sacristán wrote a relevant piece of work,[118] he communicated his poor experience in Madrid: during 7 years in a medical facility (2 of them at the Women's Mental Sanatorium in Ciempozuelos) he was not able to find a single diagnose of a single case.[119] That did not mean that there were not cases requiring to be treated, but a very ill-timed system with poor mechanisms. At some point, he even got to mention the existence of a so-called 'protective law of the criminals',[120] thus, not very distant from the proposal of the Spanish penologist Dorado Montero.[121]

2.2.6. The Decree of 1931 (3rd July): on the Assistance of the Mentally Ill

This was Spain's first major relevant instrument: the Decree on the Assistance of the Mentally Ill (1931).[122] The main aim of this document was the enactment of "immediate modifications" in order to "adapt our legislation", but with the remarkable aspect of "not falling into mere copies of foreign provisions."[123] On its brief recital of motives, the law attempted to abolish certain "barriers" which had been imposed without

[113] "Real orden referente á la reclusión de dementes en los Manicomios…", p. 1053.

[114] Kraepelin, E., *Die psychiatrischen Aufgaben des Staates*, Jena: Verlag von Gustav Fischer, 1900; Weygandt, W., "Die Entwicklung der Hamburger Irrenfürsorge", *Psychiatrisch-Neurologische Wochenschrift* 22, 1920-1921, pp. 49-72.

[115] See the explanation further on.

[116] The First Spanish Phrenopathic Congress was hosted in 1883 in Barcelona, the Society of Psychiatry and Neurology was founded in 1911 in Barcelona, and the Spanish Association of Neuropsychiatry was founded in Barcelona in 29 December 1924. Indeed, its act of constitution was branded by J. Lázaro as "decidedly Catalan", given that the 16 participants were all Catalan. It was followed by its first scientific act in 21-23 June 1926 at the College of Physicians of Barcelona. The first Chairs of Psychiatry and Neurology were established in 1933 at the Autonomous University of Barcelona,

[117] Valencia already had in 1410 a Sanatorium for the mentally ill in a situation of homelessness. More recently, Pedro Marset pointed out that Valencian psychiatry was about to become institutionalised at the beginning of the Spanish Civil War. Lázaro, J., "Historia de la Asociación Española de Neuropsiquiatría", *Revista de la Asociación Española de Neuropsiquiatría*, No. 75, vol. XX, 2000, pp. 397-515, p. 401.

[118] Sacristán, J. M., "Para la reforma de la asistencia…", pp. 519-529.

[119] Sacristán, "Para la reforma de la asistencia…", en particular vid. p. 520.

[120] Sacristán, "Para la reforma de la asistencia…", en particular vid. p. 520.

[121] Dorado Montero, P., *El Derecho protector de los criminales*, Madrid: Librería General de Victoriano Suárez, 1915.

[122] "Decreto dictando reglas relativas a la asistencia a enfermos psíquicos", *Gaceta de Madrid*, No. 188, de 07/07/1931, pp. 186-189, Departamento: Ministerio de la Gobernación, enlace: https://www.boe.es/datos/pdfs/BOE//1931/188/A00186-00189.pdf.

[123] Recital of Motives "Decreto dictando reglas relativas a la asistencia a enfermos psíquicos".

any “social or scientific justification”, as well as to ease the several useless and degrading constraints which suffered both the patient and his family.[124]

The act stated that the mentally ill should receive in Spain medical assistance, either in a private environment (with his family) or in a psychiatric facility (both private and public).[125] Though it may seem like a very generic statement, the requirement was very strict: its technical organisation should meet the “current standards of the psychiatric science.”[126] Indeed, these facilities were obliged to “strictly abide the precepts that modern psychiatry demanded” and should obtain, likewise, the approval of the *Ministerio de Gobernación*, following the previous record of the psychiatry section of the Ministry. In the same way, article 3 foresaw two general requisites: that all sections devoted to chronic or acutely ill patients had a “permanent bath facility”, and that “physical coercive means”, such as straitjackets or ties, should not be used under any circumstance.[127] Furthermore, the possibility of resorting to an ambulance with qualified personnel and a psychiatric dispensary (consulting room) was prescribed for every psychiatric institution, as well as having a regulation for its internal functioning.[128] An annual inspection had be conducted on every hospital, and the provincial board of trustees was created for the protection and support of the mentally ill after they had been discharged from the hospital.

There were three different manners in which admission to mental institutions could be produced: by one’s own will, by medical indication or by governmental/judicial order. In the first place, the voluntary admission to a mental facility required a certificate signed by a registered physician, and legalised by the District Medical Inspector, a declaration signed by the patient itself expressing his wish to be treated, and the admission to the facility by the Medical Director thereof. In the second place, the admission by medical indication required a certificate signed by a registered physician in which the symptoms and the outcomes of the psychic and somatic exploration were briefly outlined,[129] plus a declaration signed by the patient’s closest parent or his legal representative. However, there was a very relevant restriction in order to avoid fraud: the so-called incompatibility clause. Doctors issuing this certificate could not be related within the fourth civil degree to the person making the request, to any of the physicians of the establishment where the observation and treatment was to be carried out, to the owner or to the manager. Various reasons justified such involuntary admission such as the dangerousness, a mental disease advising to isolate him, the incompatibility with social life and incorrigible drug addictions. In the third place, governmental or judicial admission could either happen by simple observation or by the mere application of the relevant provision of the Criminal code. Regarding the governmental order, it should be dictated by the civil governor, by the police chief of the corresponding capital of province

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[124] Recital of Motives “Decreto dictando reglas relativas a la asistencia a enfermos psíquicos”.

[125] The meaning of the expression ‘psychiatric facility’ was further clarified in the text: mental hospital, asylum, nursing home or sanatorium. In any case, the requirements were rather unambiguous: any institution admitting the mentally ill, being always more than five and whose technical guidance is entrusted to a specialist of recognised expertise, holding the medical diploma, which had been by issued by a Spanish university.

[126] Art. 1 “Decreto dictando reglas relativas a la asistencia a enfermos psíquicos”.

[127] Although if there was an explicit order from the doctor in charge it could be eventually observed.

[128] As laid down by the article 44 of the *Reglamento de Sanidad Provincial*.

[129] This had to be done through a simple and special formular for the mentally ill published by the *Dirección de Sanidad*.

or even by the mayor in minor populations. Concerning the judicial order, in the maximum term of 6 months, the Medical Director of every mental hospital was compelled to send a report with the results of the mentally ill which had been admitted by the hospital.

Some additional remarks should be considered. Article 12 foresaw the procedure for emergency admission and its features, whereas article 14 was devoted to the steps to follow whenever a complaint for undue, wrongful confinement had been lodged. Article 18 envisaged that the mentally ill who was homeless, without economic support or lacking a family could be admitted with no further ado in the observation department within a mental institution. Article 23 described the particular regime for those mentally ill subject to the military service. Article 24 established criminal responsibility in case of a falsification of the certificate: such criminal responsibility rested upon the Medical Director or its substitute, and according to article 26 the family or legal representative of a dangerously mentally ill person who, despite medical advice, had not taken the appropriate precautionary measures (institutionalisation, private supervision), was to be civilly liable for the criminal actions of the mentally ill person against the life of the others. As for the medical discharge, it could happen just by the application of the interested (if voluntarily) or by the doctors' certificate or permission of the Authority (if by medical indication or governmental/judicial order). A rather interest provision was that of the last paragraph of art. 27: if the director considered the patient to be in a dangerous state, he may oppose his discharge until such time as the governmental authority ordered so. Finally, article 30 established the possibility to grant as a test temporary permission to leave the facilities (no longer than 3 months), as well as exceptional permission to stay out of the facilities of up to 2 years. For those temporary stays, three requirements had to be met: that they could be immediately readmitted without any further formalities, that their families/responsible in charge had to send every month a brief outline of the situation of the patient, and that the family could not oppose to the visit of medical personnel.

2.2.7. The Ministerial Order of 1932 (16th May): on the Education of Psychiatric Nurses

Because of the previous ministerial order, it soon became necessary to break with a system that submitted the mentally ill to "care" of individuals without any kind of "previous preparation", neither "psychiatric" nor "medical."[130] According to the advances of "psychiatric science" and to modern ideas on "mental hygiene", several relevant amendments should be implemented.[131] In the first place, the existing medical personnel of a psychiatric establishment, both public or private, would be divided into "sanitary staff" and "non-sanitary staff."[132] Within the first one, there were practitioners in Medicine and Surgery who held the psychiatric nurse diploma: there would be 2 of them per establishment with more than 50 patients, and they would assist the doctors and ensure a proper medical and surgical practice. There would be as well those psychiatric nurses

[130] "Orden relativa al personal sanitario subalterno que existirá en los Establecimientos psiquiátricos públicos y privados", *Gaceta de Madrid*, No. 141, de 20/05/1932, pp. 1334-1335, Departamento: Ministerio de la Gobernación, enlace: https://www.boe.es/datos/pdfs/BOE//1932/141/A01334-01335.pdf.

[131] "Orden relativa al personal sanitario subalterno…", p. 1334.

[132] "Orden relativa al personal sanitario subalterno…", p. 1334.

directly in charge of the care of the mentally ill, following the physician's indications. In the second place, non-sanitary personnel would take care of other functions such as "laboratory" or "cleaning."[133]

However, the most relevant part of this legal instrument was precisely the detailed instructions to obtain the title of psychiatric nurse: where to enrol to the state exam (Madrid, Barcelona, Granada and Santiago), the requirements for applying (older than 22 years old, successfully passing a medical and psychotechnics test), relevant data, merits, and even a "certificate of good conduct."[134] The exams took place annually and the courts would be appointed to the General Direction of Healthcare. It appeared depicted as a very specific process, and despite the high level of bureaucracy, one of the most modern systems of Europe was implemented. Spain got closer to its European counterparts, particularly to Germany and its everlasting model:

> "The examination reports shall be sent to the Section of Psychiatry and Mental Hygiene of the General Directorate of Health, which shall issue the diplomas of psychiatric nurses, which shall be signed by the President of the Higher Psychiatric Council, with the approval of the Director General of Health."[135]

Altogether, within the same Gazette, it was published the official programme of studies with all the lessons and its contents.[136]

3. Specific jurisdictions

3.1. War Navy Code

The *Código de la Marina de Guerra* was very explicit when it came to the circumstances grading criminal responsibility. On the article 10, a list of people exempted from criminal liability was provided. Paragraphs 1, 3 and 12 are to be highlighted here.

On the one hand, Paragraph 1 reserved this possibility to the "imbecile" and the "mad criminal", unless this latter had acted in an interval of reason. As it can be observed, the nuance of this moment of lucidity or clarity was only foreseen for the mad criminal, yet not for the imbecile, who was considered this way in a permanent fashion.

On the other hand, Paragraph 3 established the exemption from criminal responsibility to anyone "over the age of nine and under the age of fifteen", to anyone "deaf and dumb from birth", or to those "under the age of eighteen", unless they had acted with discernment. In any case, the seaman was always considered to "have acted with discernment" in crimes of "insubordination". Thus, in these cases a discretionary penalty should be applied in "proportion to the degree of malice" that was found in the seaman under fifteen years of age.

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[133] "Orden relativa al personal sanitario subalterno…", p. 1334.
[134] "Orden relativa al personal sanitario subalterno…", p. 1334.
[135] "Orden relativa al personal sanitario subalterno…", p. 1335.
[136] "Orden relativa al personal sanitario subalterno…", p. 1335.

Finally, Paragraph number 12 took away responsibility in the cases of "due obedience". This circumstance should be considered by the courts, according to the "circumstances" of each case, and bearing in mind whether, in the case of an act punishable under this Code, the obedience was rendered "with malice" or "without malice".

3.2. Code of Military Justice

Regarding this Code, there were two relevant aspects to stress out: the article 173 and the appendixes. Whereas the first one was just a regular provision of it concerning insane offenders, the appendixes were some extracts of the complementary provisions of the Code of Military Justice and so they followed its publications.[137]

The article 173 addressed the manner in which the Courts should behave in assessing the "mitigating" or "aggravating" circumstances of the offences covered by this law. They should act according to their "prudent judgement", taking into account the degree of "perversity" of the offender, the "relevance" of the offence, the damage caused or which "could have been caused" in relation to the service, to the interests of the "State" or that of "private individuals", and the "type of punishment" prescribed by law. This provision pointed out the fact that "drunkenness" should not constitute an extenuating circumstance for "military personnel", unless the offender had committed the offence "under the influence" of ill-treatment after being in that state. Besides, regarding the offences of insulting a superior, the abuse of authority may be considered as an mittigating circumstance for the purpose of reducing the corresponding penalty by one or two degrees.

On the other hand, the two appendixes could help to bring some light to this issue. Firstly, the Issue No. 146 transposed an order from the Spanish Ministry of Governance. It established that no "insane person" should be admitted to the Asylum of Leganés if he was presented at the establishment "after one month" from the date on which the sentencing court received notice from the administrator of the Asylum, informing of any vacancy.[138] Secondly, the Issue No. 147 thereby established that the citizens prosecuted by the War Jurisdiction, to whom it was necessary to submit to observation as "presumed insane", could be admitted to "military hospitals."[139] Thus, they should not have to pay for it. The Spanish legislation to this respect has always been a very protective system.

4. Law and practice: the reality behind the application of the laws

Far from what one could initially think, there were more insights directly affecting and shaping the treatment given to insane offenders that had a determining influence on the legal provisions.[140] Where does this come from? The analysis of the treatment of

[137] In this case, the two extracts we will be handling are the ones written by the Lieutenant Auditor Mr Juan Martínez de la Vega.

[138] Número 146. R. O. C. de 20 de febrero de 1891 (C. L. núm. 84).

[139] Número 147. R. O.C. de 1 de abril de 1892 (C. L. núm. 100).

[140] Vid. the study carried out by Aniceto Masferrer in this same issue of *GLOSSAE*: Masferrer, A., "The rise of dangerousness in the Spanish criminal law (1870-1931). The case of insane offenders: Medical

dementes and *locos* would be incomplete without assessing the doctrinal change and the case-law.

4.1. A change in society's mindset: doctrinal shift

Right at the end of the 19th century and the beginning of the 20th century, there was a change of the concepts of insanity and madness. Their meaning went from a more social content to a more medical, biology-alike concept. Until the 19th century, the crime was considered to be conducted purely by the offender's behaviour, whereas from the 20th century onwards what determined it was the 'mental disease'. The so-called 'mentalists', 'phrenopaths' or 'alienists' as figures determining the 'madness' of an individual rapidly proliferated.[141] In a nutshell, insanity was no longer considered as a disease of the soul, but a disease of the mind. The taking over of positivist theories, Social Defence authors and above all psychiatry contributed to a specific change. A great part of that change came thanks to the role played by doctrine and jurisprudence.

In Spain, the new science consolidated mainly in the courts, with forensic doctors being their best representatives. The incorporation of the medical concept of madness or insanity had a concrete scenario: the judiciary. Essentially, forensic doctors were supporting the new science. They were the protagonists of what Salillas called "the forensic campaign."[142] The outcome of this was the institutionalisation of the medical expertise and medical reports, which were bearing a hand to the system of justice.[143]

To this respect, we must introduce the General Act on Healthcare of 1855,[144] which created the Forensic Body of Physicians.[145] In May 1862, the Royal Decree Organising the Forensic Body was passed.[146] It took as a starting point the previous General Act on Healthcare.[147] It foresaw the organisation of the forensic body by October of the same year, and prescribed the minimum of one forensic doctor for each Court of First Instance.[148] The requirements to become one were: to be Spanish, to be at least 25 years old, to hold the degree in Medicine and Surgery, to have two years of experience,

experts vs. judges and criminal lawyers?", *GLOSSAE. European Journal of Legal History* (20) 2023. He focuses on the influence of the doctrine on the same issue.

[141] Giné y Partagás, J., "Aforística Frenopática", *Revista Frenopática Barcelonesa*, Año I, núm. III, 1881, p. 12; Giné y Partagás, J., *Tratado teórico-práctico de freno-patología ó estudio de las enfermedades mentales: fundado en la clinica y en la fisiologia de los centros nerviosos*, Madrid: Imp. Moya y Plaza, 1876, 572 pp.

[142] Salillas, R., "Los locos delincuentes en España", *Revista General de Legislación y Jurisprudencia*, Tomo 94, 1899, p. 124.

[143] Salillas, "Los locos delincuentes en España, p. 124.

[144] "Ley sobre Sanidad", *Gaceta de Madrid*, No. 1068, de 07/12/1855, pp. 1-2, Departamento: Ministerio de la Gobernación, enlace: https://www.boe.es/datos/pdfs/BOE//1855/1068/A00001-00002.pdf.

[145] Chapter XVI, and articles 93, 94 and 95. Nevertheless, the content is merely bureaucratic and exclusively related to the organisation and retributions. It does not pose any particular interest for the topic of insane offenders. That is the reason why we decided not to devote a whole section to it within the point 2 "Normative development".

[146] "Real decreto organizando el servicio médico forense", *Gaceta de Madrid*, No. 137, de 17/05/1862, p. 1, Departamento: Ministerio de Gracia y Justicia, enlace: https://www.boe.es/datos/pdfs/BOE//1862/137/A00001-00001.pdf.

[147] Article 95 "Real decreto organizando el servicio médico forense".

[148] Article 2 "Real decreto organizando el servicio médico forense".

and to have good conduct.[149] Later, in 1899, the Decree Organising the Medical Forensic Body of Madrid was passed. It structured this body in three sections: the Section of Medicine and Surgery, the Section of Toxicology and Biology, and the Section of Mental Medicine and Anthropology. The latter posed a particular interest. Afterwards, a very well-known handbook was published and allowed experts in this field to put things together.[150]

Concerning the exemption of criminal responsibility of the insane offender, there was the key role of the 'expert report' on the mental state of the criminal (in certain cases the classification of a criminal as "insane" could save him from the death penalty). Until the arrival of the phrenopats, the judges determined the madness of the criminal according to the social conceptions. The new science challenged the capacity of the judge to assess the criminal madness and to determine their responsibility. Whereas initially this was not particularly trustful, with time, and long after phrenology had been dismantled, the proposal for the creation of a more serious body would gradually acquire relevance: the so-called *Cuerpo de Alienistas*. It would be directly depending on the General Healthcare Direction and they would manage the technical regime of Spanish mental hospitals and their organisation. They would be the very single experts to intervene in every judicial record regarding the issue of "incapabilities" or "interventions" in the criminal law sphere, as well as on the "appreciation of criminal responsibility before the Justice."[151] This body would always be a consulting body of the corporation or owner of the establishment, and it would consist of the current doctors from the Spanish mental asylums, clinical heads of mental Medicine at the hospitals, or whomever doctor holding sufficient degree of specialisation or experience. However, the most relevant part of it was their commitment to the dissemination of the discipline and transmission of knowledge as to create a consistent branch of science:

> "All head doctors of nursing homes would be assigned the obligation to give at least once a year an elementary course in psychiatry for doctors and medical students with the collaboration of the auxiliary technical staff. In the provincial capitals that have a Faculty of Medicine, the head doctor of the asylum for the insane should be an associate or assistant professor of the said Faculty, overseeing the teaching of the speciality that he would give in the form to be agreed with the academic authorities."[152]

Besides, all the relevant discussions and experts' proposals would eventually lead to the modification of the legislation in a certain way. For instance, most of the findings of the need of an amendment of the legislation would be finally implemented in the Decree of 1931. Let us focus on the main discussed points which, according to the specialists, required a reform. The first one would be the modification of the aspect of "psychiatric expertise", thus, only appointing those doctors "who have sufficient skills". The second would revolve around the unification of confuse, unspecific and -sometimes- redundant terminology by expressing the concept of insanity in a "single word", including all mental illnesses, in order to avoid distorted interpretations of the content of number 1

[149] Article 3 "Real decreto organizando el servicio médico forense".

[150] *Manual de facultativos titulares, de médicos forenses y de baños*, Madrid: El consultor de los Ayuntamientos y de los juzgados municipales, 1914.

[151] Jiménez Riera, J., Escalas Real, J., Torras, O., "Creación de un Cuerpo de Alienistas (1926)", *Revista de la Asociación Española de Neuropsiquiatría*, Vol. 20, No. 75, 2000, pp. 565-566, en particular vid. p. 566.

[152] Jiménez, Escalas Real, Torras, "Creación de un Cuerpo de Alienistas (1926)", p. 566.

of Article 8 of the Criminal Code of 1870. The third point consisted in the suppression of the power granted by law to the Court to hand over an "insane person"[153] to his or her family if the latter is sufficiently trusting of his custody. The fourth point was the requirement of a psychiatric examination of all prisoners on admission to prison, in order to establish the necessary separation between alienated and non-alienated offenders. In order to carry out these examinations (as well as further periodical ones), the creation of 'Observation Departments' was necessary (and they should go hand in hand with the prisons). Likewise, the cumbersome processing of the insanity files of alienated persons who were then in prisons should be simplified. The same simplification should be applied to all those defendants whose mental disorder became apparent during the serving of their sentence. Another very relevant point was the creation of 'agricultural colonies' for those entailing a serious risk for society: dysgenics, feeble-minded, hysterics, epileptics, cyclothymics, alcoholics, etc. It was not surprising that the idea of 'social dangerousness' was catching on in this period. Indeed, one of the other guidelines was that "our criminal legislation should be made of the principles of the "Social Defense":

> "[instead of following] the old metaphysical postulates of responsibility, thus granting to the judicial officials, duly advised by psychiatric experts, a wider scope of freedom to apply, at their discretion, in addition to conviction and probation, the judgment, or rather the indeterminate judgement."[154]

Besides, civil liability should be assessed by the judge (advised by psychiatric experts) in order to ensure a treatment like that of the emancipated minor and the individual declared as prodigal. However, the extent of the control that the experts wished to hold sometimes began to be excessive. This was what traditionalists were alerting of. For instance, art. 89 of the Spanish Civil Code prevented those who were not in the full exercise of their reason from getting married. The experts wanted to widen the scope of this provision and to include the following ones as well: those suffering from periodic or intermittent insanities, hysterics, epileptics and, in general, to all those suffering from chronic mental illnesses which could be "transmissible to the offspring". Additionally, they also asked for a rule requiring presenting a "premarital sanity certificate". Similarly, when dealing with the capacity of making a will, they wished to require by law the intervention of a physician (a psychiatric one, when possible) whenever there was a "doubt on his mental state" or his acts were undermining "compulsory heirs on their rights".

Nevertheless, the main facet was the conflict between judges and doctors (phrenopaths). The judges were not really discussing the core issue of insanity but defending their capacity of assessing the criminal responsibility of the criminal. Judges represented the social definition of insanity that should disappear, and the expert doctors represented the new social definition on the rise.

To sum up, in that time there was an ongoing, institutional conflict in the legal field on the figure of criminal responsibility. Dorado Montero identified the reluctance of the magistrates to accept the new configuration of insanity. Bernaldo de Quirós, as a man

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[153] Who has committed a less serious offence.

[154] Saforcada, M., Busquet, T., "Necesidad urgente de una revisión de la legislación relativa a alineados (1926)", *Revista de la Asociación Española de Neuropsiquiatría*, Vol. 20, No. 75, 2000, pp. 545-546, en particular vid. p. 545.

of science, showed his concerns for the magistrate's rejection towards the expertise reports. Maestre and Esquerdo were the representatives of the new medical conceptualisation of insanity. This idea which we saw at the beginning of this article concerning legislation was firstly identified by the doctrine. Pulido Fernández was one of the authors who identified this problem, i.e. his clash between the two bodies:

> "when there is disagreement between several experts, the Court's ruling is always on the side of those who accept responsibility. This is the story that repeats itself at every step."[155]

Doctrine just pushed into written laws what scientific experts were asking for. The fact that case-law frontally opposed to it was a cause for conflict, as we will see now.

4.2. The case-law of the Supreme Court: struggling for authority

The Criminal Code of 1870 depicted that there were several provisions that even at the highest legislative level allowed for the wide interpretation of the law.[156] This left the door open to the judge's margin for manoeuvre.

The role of jurisprudence played a decisive role in solving certain legal loopholes, as well as a decisive element in the gestation of future reforms to resolve what only judges had perceived as a problem in their practice.

As opposed to what has been asserted, the Spanish legal system belonging to the Continental or Civil law tradition held a relevant degree of discretion regarding the judiciary. There were several articles in which such room for manoeuvre could be found.[157] For starters, there was a set of common provisions to misdemeanours establishing that the courts should proceed "according to their prudent discretion", within the limits of each one, and taking into account the "circumstances of the case".[158] When dealing with civil liability, the provisions made sure that the reparation would be made by "assessing the extent of the damage", considering the price of the thing, when possible, and that of the affection of the injured party.[159] Within the crimes against persons, injuries not included in the preceding articles which rendered the offended party unfit for work for eight days or more, or which required the assistance of a doctor for the same length of time, should be considered less serious and should be punishable by major arrest or banishment and a fine of 25 to 1,250 pesetas, according to the "prudent judgement of the courts."[160] Besides, in the treatment of recklessness, the courts should too "proceed according to their prudent discretion", without being subject to the rules prescribed in article 82.[161] Even regarding the duration of the penalty and the effects of the penalties, the court possessed a great margin of discretion. Let us remember that the "court shall determine", at its discretion, the "duration of the bail."[162] Finally, this discretion could

[155] Pulido Fernández, A., *Locos delincuentes*, Madrid: Imprenta de la Revista de la Legislación, 1883, p. 64.

[156] Since it was the one acting as a role model for the very rest of them.

[157] We are taking the Criminal Code of 1870 as a reference.

[158] Art. 620 CC 1870.

[159] Art. 123 CC 1870.

[160] Art. 433 CC 1870.

[161] Art. 581 CC 1870.

[162] Art. 4 CC 1870.

easily be observed within a group of provisions regarding the circumstances modifying criminal liability. On circumstances aggravating criminal responsibility, when addressing being the aggrieved party's spouse or ascendant, descendant, illegitimate, natural or adoptive sibling, or affinity in the same degrees as the offender, then the circumstance should be "taken into consideration by the courts" as an aggravating or mitigating circumstance, according to the nature and effects of the offence.[163] In a similar way, when carrying out the offence by means of printing, lithography, photography or any other similar means that facilitated publicity, it should "be taken into consideration by the courts" as an aggravating or mitigating circumstance, "depending on the nature and effects" of the offence.[164] If we moved to those circumstances attenuating criminal responsibility, the courts would have to assess the "degree of drunkenness":

> "Execution of the act in a state of drunkenness, when this is not habitual or subsequent to the plan to commit the offence. The courts shall decide, in view of the circumstances, the persons and the facts, when drunkenness is to be considered habitual."[165]

Also, the application of penalties enclosed a pronounced judicial discretionality when they foresaw the possible use of analogy:

> "Where the law stipulates the penalty for the offence in a manner not specifically provided for in the four preceding rules, the courts, proceeding by analogy, shall apply the corresponding penalties to the perpetrators of attempted and frustrated offences and to accomplices and accessories."[166]

Furthermore, on the section on circumstances exonerating from criminal responsibility, one of them was to be an "imbecile" or an "insane", unless the latter had acted in an "interval of reason."[167] If the insane person had committed an act which the law classified as a serious offence, the court should order him to be confined in one of the hospitals for the sick of that class. The Court, however, may have a saying on this by choosing between "carrying out the provisions of the preceding paragraph" or rather "deliver the imbecile or insane person to his family", whenever the latter provided a sufficient surety for his custody. That being said, we did not even mention the standard, generic provisions in which the courts should apply the corresponding penalty in the "degree" they deemed "appropriate."[168]

As stated in the aforementioned section, there was an effective clash between the medical approach and the judicial approach. Critics to the system warned that there was nothing in it that met the modern concept of reclusion. The confinement of the mentally ill, or rather their hospitalisation, was a therapeutic measure, the indications for which could only "be fulfilled by the doctor". However, it was true that not every mentally ill person was dangerous, and even if they were, they should not be treated only from a police point of view. Only the psychiatrist was qualified to handle this system.

[163] Art. 10 CC 1870.
[164] Art. 10 CC 1870.
[165] Art. 9.6 CC 1870.
[166] Art. 76.5 CC 1870.
[167] Art. 8.1 CC 1870.
[168] Art. 8.1 CC 1870.

We ought to get rid of the idea that asylums were "hard, repressive systems",[169] but they were rather hospitals or medical clinics "where the patient must be treated as such."[170] The asylum should never be considered as a penitentiary reformatory. Thus, the main flaw of these Spanish laws was their one-sidedness, i.e. their strictly legal and not medical point of view:

> "For the doctor, confinement has only one purpose: treatment or assistance. Whereas the jurisconsult -as Schultze quite rightly expresses- together with the layman, considers imprisonment only as the deprivation of liberty, the doctor wants to assist the sick person quickly; the jurisconsult is only concerned with avoiding the imprisonment of the healthy person, which he achieves by delaying the imprisonment of the sick person as long as possible."[171]

As it can be seen, the two concepts were in stark opposition, and it was necessary that in modern law the medical concept should prevail over the legal concept. This, however, did not prove to be case of the Spanish Supreme Court. The case-law of the Spanish Supreme Court successfully proved this rivalry between the medical criterion and the judicial criterion, with the constant triumph of the latter. Not only did the doctrine stress that out, but the case-law itself did. There was a series of judgements in which despite all the medical concerns or indications advising for the need of a different treatment, the court ended up rejecting the appeal, thus, disregarding the medical and psychiatric concerns modifying the liability of the insane. As we will see, this confirmed judicial supremacy over the experts' view.

In a judgement of 1870, the court did not seem to consider the fact that the defendant had been hospitalised at Granada's mental asylum. The court finally rejected the appeal by stating that his intelligence "remained intact" like the rest of his "faculties", namely instruction, habits and customs.[172] Indeed, drunkenness was not even considered as a mitigating circumstance since the court concluded that it felt within "habitual drunkenness."[173]

In another judgement of 1872, despite the medical reports, the court did not accept the appeal. Forensic doctors had informed of the "nervous attacks" as well as of the "hysteric and epileptiform accidents."[174] The Court, nevertheless, concluded that it was nor clear that the "act was involuntary", neither that the author was effectively "imbecile" or "mad."[175]

A further judgment of the year 1877 showed the stiffness of the court in appreciating a possible nuance for a mental condition.[176] According to the judgement, the cases that may modify the liability needed to be specified in the law. Otherwise, and considering that none of the cases alleged within the sentence were foreseen by the law, it could not be admitted. There was no fact that "the defendant was suffering from such

[169] Essentially maintained by the Royal Order of 26 November 1903 which clarifies the provisions of art. 5 of the Order of 1885.

[170] Sacristán, "Para la reforma de la asistencia", p. 521.

[171] Sacristán, "Para la reforma de la asistencia", pp. 521-522.

[172] STS 714/1870, 05/12/1870 (Ponente: Tomás Huet y Allier).

[173] STS 714/1870, 05/12/1870 (Ponente: Tomás Huet y Allier).

[174] STS 854/1872, 18/12/1872 (Ponente: Miguel Zorrilla).

[175] STS 854/1872, 18/12/1872 (Ponente: Miguel Zorrilla).

[176] STS 275/1877, 23/04/1877 (Ponente: Miguel Zorrilla).

disease."[177] The court highlighted that the "ignorance" or "senselessness" that the defence attributed to the defendant was "far from being the 'imbecility' and 'madness' foreseen by the legislation as an exemption from criminal liability."[178]

Yet another judgment of 1880 was even more shocking. After the judge of first instance had condemned the defendant on the grounds of a crime of homicide in the medium degree, such penalty was left without effect after the medical examination of the defendant by the Academy of Medicine and Surgery of Barcelona. In this report of 24th July 1879, they concluded that the defendant was insane when he committed the constitutive acts of the crime and that he presented signs of a "low-level consecutive dementia."[179] However, the superior court (*Audiencia de Barcelona*), and later the Supreme Court, would completely disregard the report. They understood that the defendant "at the moment of committing the crime" was nor insane, neither "his intellectual faculties suffered from any alteration", despite the "report issued by the Academy."[180] The point of concern of the judges was that the medical report could only make sure that the defendant was in such "mind state" on the month of July, yet not in the state in which the defendant found himself in "at the moment of committing the crime."[181]

Another relevant judgement of 1884 was addressing the validity of a donation carried out by an insane individual. In this case, the person doing so was an old lady. They alleged that at the moment of performing the donation she was insane and, thus, the donation was lacking any validity. The court estimated otherwise and considered that in the precise moment of the donation the lady was not mentally alienated.[182]

In 1887, another judgment of the Supreme Court took away the relevance of a medical criterion.[183] The prison employees Miguel Ciríaco Martínez and Juan Asensio Fuente committed a crime within the facilities. The medical doctor José Pardo declared at the oral trial that when the defendant committed that crime he was "crazy", more specifically in the state of "paroxysm" and that the type of madness he suffered from was a "hallucinatory paranoia."[184] The court estimated that his assessment was inadmissible since the doctor had "only examined him twice": the first time was soon after he was arrested, and the second time was at the prison.[185] Additionally, this defence was based upon facts that "he had heard to other people before coming up with this idea himself."[186]

In a judgement of 1912, it was stated that the defendant was suffering from a minor epilepsy and that he committed the crime under the influence thereof. However, the court reminded that such a disease had different phases or gradations which were of greater or lesser importance, depending on the origin of the ailment, background and other circumstances surrounding the patient. All those circumstances had to be stated in an

[177] STS 275/1877, 23/04/1877 (Ponente: Miguel Zorrilla).
[178] STS 275/1877, 23/04/1877 (Ponente: Miguel Zorrilla).
[179] STS 531/1880, 29/11/1880 (Ponente: Diego Fernández Cano).
[180] STS 531/1880, 29/11/1880 (Ponente: Diego Fernández Cano).
[181] STS 531/1880, 29/11/1880 (Ponente: Diego Fernández Cano).
[182] STS 1176/1884, 11/10/1884 (Ponente: Raimundo Fernández Cuesta).
[183] STS 822/1887, 24/03/1887 (Ponente: Diego Montero de Espinosa).
[184] STS 822/1887, 24/03/1887 (Ponente: Diego Montero de Espinosa).
[185] STS 822/1887, 24/03/1887 (Ponente: Diego Montero de Espinosa).
[186] STS 822/1887, 24/03/1887 (Ponente: Diego Montero de Espinosa).

accurate and clear manner so that it could be deduced whether he had his intellectual faculties completely abolished and whether he could be classified as 'insane'. Nevertheless, according to the court, "none of this has been affirmed", and since it was "not possible to consider as causes for excluding liability those which are not expressly provided for by the legislator", the sentencing Chamber decided not to give "the said mental alteration" the "force" of an "exonerating circumstance."[187] Therefore, the Supreme Court finally convicted the defendant.[188]

Finally, in a judgment of the Supreme Court of 1919, a rather interesting pledge of one the lawyers could be found:

> "Who would dare to hold the madman, the idiot, the phobic or the degenerate responsible for the stigma of his nature? It is possible that legitimate Social Defence may require a straitjacket, confinement in a sanatorium; but never […] the sanction that is applied to those who control their powers […]."[189]

The judgement was not absolutely naive, since the experts acknowledged that "passions are all susceptible to degrees", but when they "go beyond the normal" they "end up" falling into the "pathological area" and do constitute "true psychoses."[190] This variation and evolution of their degrees must be kept in mind when assessing the insane: "the thief, the incendiary, the arrogant, the proud, can degenerate into a kleptomaniac, pyromaniac or megalomaniac, or like nomadism can evolve into claustrophobia, among others."[191]

5. Concluding considerations

Far from what one could initially think, there were more legal provisions directly affecting and shaping the treatment given to insane offenders. However, the many different pieces of legislation incorporated very small, progressive changes. All those changes went towards the same direction: leaving behind an excessive legal formalism, slowly increasing the flexibility of conditions, bestowing scientific postulates with predominant role in the judicial decisions, transforming judicial measures, ultimately making the treatments more suitable the insane offenders. However, that process went extremely slow. They always found the opposition of the judges who wanted to preserve individual freedom of the citizens and to stress out the individual responsibility, as to not blame it on other rather biological, more deterministic postulates. Therefore, within this steady process, the most relevant aspect was the passing of the Decree of 1931 on the Assistance of the Mentally Ill. It entailed a major change, and met most of the revindications of the experts:

> "[It took] half a century of titanic struggle to achieve a Decree for the care of the mentally ill, which would respond to the progress of Medicine, and as a result, the incomprehension and negligence of the Monarchy and all its Governments. [It took] a little more than a year of successive projects of almost complete psychiatric reorganisation, some of them inspired by a

[187] STS 475/1912, 12/03/1912 (Ponente: Ricardo Juan Ortiz).
[188] STS 475/1912, 12/03/1912 (Ponente: Ricardo Juan Ortiz).
[189] STS 397/1919, 12/05/1919 (Ponente: José María de Ortega Morejón).
[190] STS 397/1919, 12/05/1919 (Ponente: José María de Ortega Morejón).
[191] STS 397/1919, 12/05/1919 (Ponente: José María de Ortega Morejón).

great revolutionary spirit, and, as a result, several Decrees and Ministerial Orders of the Republic, in general very well oriented, despite the speed with which they have been promulgated. The patient, object of our scientific activities and our social concerns, can now be assisted without absurd obstacles of any kind."[192]

Nevertheless, five years later the Spanish Civil War would take place and the Dictatorship would stop. Most of the process would be reverted.

On the other hand, although our jurisdiction belongs to the continental or Civil Law system, Spanish judges assumed a wide discretionality. To this respect, doctrine had boosted the legislative change, the same way that the excessive guarantism of judges had acted as an obstacle to the treatment of the insane. That is the reason why we consider that the judges played a more significant role than what historiography has traditionally attributed to them.

Even though this is a normative study, it should be noted that judges from the 19th and 20th century Spain were not even close to fit the cliché which depicted them as machines that applied the law aseptically. Due to the limited extention of this article, it was not possible to bring the an extensive analysis of the existing case-law. The big analysis of the relevant judgements will be shown in a latter work. Thus, we opted for showing a part of the analysis in order to offer a critical remark. As we can see here, the work of the judiciary acted as a hand brake to the Social Defence theories in Spain. The judiciary never supported their ideas. A *de facto* rejection took place. The overall majority of judges did not support the idea that responsibility for the own acts rested upon an illness or that it had a biological origin, but it was rather a moral decision, which stressed out the belief on the existence of freewill. Thus, a model in which the judge is completely detached from the creative capacity of law is not plausible, at least in practice. The analysis of the treatment of *dementes* and *locos* would be incomplete without assessing those two realities: complementary laws forced by the doctrine (which forced the changing legislation) and the decisions of the judges slowed and stopped the changing legislation.

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[192] Rodríguez Arias, B., "Sexta Reunión anual de la Asociación Española de Neuropsiquiatras (Granada, 2, 3, 4 y 5 de octubre de 1932", *Archivos de Neurobiología* 12(6), 1932, pp. 945-972, en particular vid. p. 951.

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