

KEY ELEMENTS OF THE CRIMINAL LAW CONFLICT SYSTEM, WITH SPECIAL REFERENCE TO SPANISH CRIMINAL LAW

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ABSTRACT

Criminally relevant conduct often falls under several criminal precepts, regulating as many criminal notions as possible, and it is necessary to decide whether all, some or only one of them could be applicable. This phenomenon, termed 'conflict', occurs when a subject's actions with criminal relevance are, wholly or partially, subsumed under different criminal precepts. To definitively classify the punishable act, it is then necessary to take a further step, which can be considered conclusive, and determine the precept or precepts applicable to the act. Hence, this paper analyses the meaning, content, and application of the conflict of laws and conflict of rules.

Keywords: Spanish Criminal Code, conflict of laws, conflict of rules

I. THE CONFLICT OF LAWS SYSTEM

1. THE CONFLICT OF LAWS PHENOMENON AS A SYSTEM

According to our theory of a criminal offence,¹ legal classification of an act with the features of a crime, as well as determining and quantifying the criminal liability it generates, should be complemented by an analysis of its essential structural elements (criminal illegality and culpability), other factors presupposing such liability (such as

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¹ Obregón García, A., Gómez Lanz, J., *Derecho Penal. Parte General: Elementos básicos de la teoría del delito*, Madrid, 2023, passim.



changing circumstances) and, where necessary, exceptional charges (e.g., punishable preparatory acts and attempts, participation, recklessness, and criminal liability of legal persons). However, criminally relevant conduct frequently can be subsumed under several criminal precepts, regulating as many criminal notions as possible, and it is necessary to decide whether all, some or only one of them could be applicable. This phenomenon, termed 'conflict', occurs when a subject's actions with criminal relevance are, wholly or partially, subsumed under different criminal precepts. To definitively classify the punishable act, it is then necessary to take a further step, which can be considered conclusive, and determine the precept or precepts applicable to the act. This question is fundamental in the so-called theory of conflicts of criminal law and is crucial for legal qualification of the act(s) committed and assessing the accrued criminal liability. Resolving this conflict can be as significant as typifying the criminal conduct in practice.

Legal doctrine, however, has traditionally overlooked this significant section of criminal theory, often examining it in a segregated, superficial, and insufficient manner. The theory of conflict of laws (or rules or precepts), whose status is branded 'rudimentary' by Gracia Martín² and even more harshly as 'unparalleled chaos', has, until recently, suffered from neglect in both Spanish and international scientific doctrine. This has started to be remedied thanks to various studies, including those by Sanz Morán,³ Castelló Nicás,⁴ Suárez López,⁵ Escuchuri Aisa,⁶ Matus Acuña,⁷ Roig Torres,⁸ Carranza Tagle,⁹ Carnevali Rodríguez and Salazar Zenteno.¹⁰ While its development has often been restricted to the field of the theory of criminal law, in terms of determining and interpreting applicable law, its connection with the theory of conflict between crimes (generally a corollary of the legal theory of crime) is verifiable, though not always highlighted. We posit that, following the valuable contributions that have recently favoured the progress of the theory of conflict in criminal law, this link should be clearly established. Moreover, we argue for its connection with the theory of punishment, particularly in determining a penalty, thus presenting a profoundly *interdisciplinary* issue.

² Gracia Martín, L., 'Prólogo', in: Escuchuri Aisa, E., *Teoría del concurso de leyes y de delitos. Bases para una revisión crítica*, Granada, 2004, pp. XV–XVI.

³ Sanz Morán, A., *El concurso de delitos. Aspectos de política legislativa*, Valladolid, 1986.

⁴ Castelló Nicás, N., *El concurso de normas penales*, Granada, 2000.

⁵ Suárez López, J.M., *El concurso real de delitos*, Madrid, 2001.

⁶ Escuchuri Aisa, E., *Teoría del concurso de leyes y de delitos. Bases para una revisión crítica*, Granada, 2004.

⁷ Matus Acuña, J.P., 'Los criterios de distinción entre concurso de leyes y las restantes figuras concursales en el código penal español de 1995', *Anuario de Derecho Penal y Ciencias Penales*, 2005.

⁸ Roig Torres, M., *El concurso ideal de delitos*, Valencia, 2011.

⁹ Carranza Tagle, H.A., *Introducción al concurso de delitos*, Montevideo, 2011.

¹⁰ Carnevali Rodríguez, R., Salazar Zenteno, C., 'El principio de alternatividad como cláusula de cierre dentro del concurso de leyes', *Revista De La Facultad De Derecho*, 2020, No. 49; Carnevali Rodríguez R., Salazar Zenteno, C., 'El delito de producción de material pornográfico infanto-juvenil en Chile. Especial atención al bien jurídico protegido y algunos problemas concursales', *Revista de la Facultad de Derecho y Ciencias Políticas*, 2022, Vol. 137, No. 52.

The analysis of this issue usually conducted under two different topics, which, in addition, belong to areas other than the General Section of Criminal Law. On the one hand, there are conflicts of rules or criminal laws, in which the solution involves applying a single concurrent precept. This study is normally left to the theory of criminal law. On the other hand, there are so-called as 'conflicts between crimes', in which several infractions can be identified and therefore multiple penal rules could be applied. These conflicts are traditionally considered a corollary of the theory of crime, although due to their specific penological regime, they also impact the theory of punishment. In the first case, the issue of conflict is viewed as a mere question of determining the applicable criminal law. This has led to some denying the status of genuine conflict, which is why part of the doctrine refers to them as 'apparent conflicts of law'.¹¹ In the second case, the conflict theory focuses on the legal regime for determining the extent of criminal liability resulting from the commission of multiple crimes and how liability should be demanded for them.

In our opinion, however, this separation is improper, as both scenarios rest on the same premise: a multitude of concurrent rules in a specific factual case, an idea affirmed by the Spanish Criminal Code, which necessitates the joint handling of both conflict types. Evidence of this is the numerous instances where the main dogmatic difficulty lies in deciding whether the conflicts arising are one of precepts or crimes (some examples of cases of undoubted practical relevance include: the conflict between attempted homicide and intentional injuries inflicted; between an omission of the duty to assist and homicide or injuries; between falsehoods and fraud; between crimes against road safety and crimes of harmful outcomes supervening from these...). Consequently, we aim to present a holistic view of criminal conflict, which, while undeniably consistent with the Spanish Criminal Code, we believe can be adapted to any system where this issue is not explicitly regulated or is based on the same foundation, as it rests on general principles underpinning Criminal Law. Concurrently, we will attempt to illustrate its explanation by applying it to various practical examples, which we hope can be used to assess the theory's consistency.

2. SIGNIFICANT PROMINENCE OF THE CONFLICT PHENOMENON

As predicted, the phenomenon of conflict arises with overwhelming frequency: it is rare that an act of criminal nature is not encompassed within more than one criminal precept. However, the considerable expansion that Criminal Law has undergone in recent decades, and the legislative techniques used in the classification of conduct, progressively less refined and more inclined towards casuistry, have heightened the issue of conflict and the complexities in addressing it.

Several factors contribute to this peak in conflicts. As we stated, the excessive expansion of Criminal Law, quantitatively, increases conflicts: logically, the more types of crime, the greater the likelihood of conflict issues arising. However, from

¹¹ Gimbernat Ordeig, E., 'Concurso de leyes, error y participación en el delito', *Anuario de Derecho Penal y Ciencias Penales*, 1992, pp. 837–838.

a qualitative point of view, this phenomenon is also enhanced, as new types of crime often deviate from the standard of crimes based on outcomes and damage; we typically encounter crimes with greater complexity, overlapping with other types of crime. Examples include crimes involving omission, increasingly prevalent in the criminal corpus; the proliferation of aggravated or attenuated subtypes, especially the former; complex crimes that include differentiated typologies, such as the case of aggravated homicide in Article 138.2.b) CC; or the creation of types derived from classics, such as a significant number of financial crimes arising from fraud. This connection between new types of crime and existing ones is an inevitable source of conflict problems and, as we pointed out, discrepancies.

3. LEGAL REGULATION AND COMPONENTS OF THE SPANISH CONFLICT OF LAWS SYSTEM

In the precepts concerning application of criminal law, the Spanish Criminal Code contains a rule (Article 8) that outlines the conflict phenomenon and aims to control it.¹² The legislator thus provides a method, whose ultimate goal, like any issue seeking to determine the seriousness of criminal liability, is to achieve proportionality:

- (a) Firstly, Article 8 of the Criminal Code defines the concept of conflict: as any case that includes one or more acts “liable to be defined pursuant to two or more provisions” of the Criminal Code.
- (b) It then establishes the rules of preferential application: Articles 73 to 77 of the Criminal Code, which are typically identified as the rules concerning conflicting offences, and which presuppose that the act or acts committed constitute or comprise two or more criminal offences.
- (c) Next, when the conflict cannot be categorised as a conflict between crimes, it prescribes a series of subsidiary rules: the four rules of Article 8 CC, which correspond to what is called conflicts between rules or laws (since, there is only one infringement, only one of the conflicting rules can be applicable).
- (d) Finally, it establishes an internal dependence relationship between the rules relating to the conflict of precepts: this is resolved, *prima facie*, by referring to the first three rules defined in Article 8 of the Criminal Code (known as the relationships of speciality, subsidiarity, and absorption), which are aimed at determining the principle capable of encompassing the entire illegality of the act. But “in the absence of the above criteria”, the rule that provides for the application of the most serious criminal precept (often referred to as the alternativity rule) is observed.

¹² Article 8 of the Criminal Code states that “Acts liable to be defined pursuant to two or more provisions of this Code and not included in Articles 73 to 77 shall be punishable by observing the following rules: 1. A special provision shall have preferential application rather than a general one; 2. A subsidiary provision shall be applied only if the principal one is not, whether such a subsidiary nature is specifically declared or when it may tacitly be deduced; 3. The widest-ranging or complex penal provision shall absorb those that punish offences committed therein; 4. Failing the preceding criteria, the most serious criminal provision shall exclude those punishing the act with a minor punishment”.

This order of precedence, derived from the content of Article 8 of the Criminal Code, is based on the principle of a comprehensive assessment of the facts, a reflection of the principle of proportionality,¹³ according to which the severity of the penalty must correspond to the gravity of the unlawful act (and its perpetrator), as well as to the degree of culpability. The sentencing implications in the event of a conflict are that it must strive to cover as much of the illegality of the conduct as possible. If the act constitutes two or more infractions, which must be considered to fully evaluate this illegality, it is necessary to initially address the conflict between crimes. However, if the act cannot primarily be considered as constituting two or more offences – which will be clarified below, due to the meaning and requirements of the *non bis in idem* principle¹⁴ – it is necessary to verify if just one of the precepts covers the entire scope of the act's illegality, making it the applicable precept (satisfying the principle of proportionality fully), and if not, it is necessary to apply the precept that covers the most illegality (thereby satisfying the principle of proportionality as much as possible).

Therefore, the rules relating to the conflict of offences are applied first; followed by the rules of specialty, subsidiarity, and absorption; and, finally, the rule of alternativity. These represent three successive steps to address the issue of conflict, guided in every case by the ultimate goal of proportionality. In the first two cases, this goal is fully achieved, and in the third, it is achieved as much as possible (although some doctrinal¹⁵ sects argue the principle of comprehensive fact assessment prevails over the *non bis in idem* principle).

4. CRITERIA FOR DISTINGUISHING BETWEEN A CONFLICT OF OFFENCES AND A CONFLICT OF RULES

In broad terms, to apply the procedure for the conflict system outlined by the legislator in Article 8 CC (which, as we have mentioned, we believe can be adapted to any system governed by the aforementioned principles, namely, *non bis in idem* and proportionality), it is necessary to clarify the essential moment of this system: when the rules of conflict between offences apply or, conversely, those of conflict between precepts.

As explained, the grounds for applying the conflict rules pertaining to conflict of offences is the assertion of the existence of more than one infringement. This assumption requires, at least, two conditions: one positive, the plurality of typical actualities (the acts must be subsumed under several types), and one positive-negative, the plurality of infringements, which, in the majority doctrine's view,

¹³ Aguado Correa, T., *El principio de proporcionalidad en Derecho Penal*, Madrid, 1999; Cuerva Arnau, M.L., 'Aproximación al principio de proporcionalidad', in: *Derecho penal, Estudios jurídicos en memoria del Profesor Dr. D. José Ramón Casabó Ruiz*, Valencia, 1997.

¹⁴ de León Villalba, F.J., *Acumulación de sanciones penales y administrativas. Sentido y alcance del principio "non bis in idem"*, Barcelona, 1998.

¹⁵ Escuchuri Aisa, E., 'El concurso de leyes en el contexto legislativo reciente. Algunas reflexiones en torno al principio de alternatividad', in: Pozuelo Pérez, L., Rodríguez Horcajo, D., *Concurrencia delictiva: la necesidad de una regulación racional*, Madrid, 2022, pp. 97–98.

implies the absence of a violation of the non bis in idem principle. The first condition is necessary for a genuine conflict, which serves as a starting point; therefore, the second condition is where issues arise.

Since Constitutional Court ruling 2/1981 of 30 January (RTC 1981/2), the Spanish Constitutional Court has acknowledged that the *non bis in idem* principle is part of the fundamental right to the principle of criminal legality in criminal and penal matters. This principle, according to the Court ruling, prohibits imposing two sanctions in cases where the subject, the act, and the basis are identical. However, as García Albero elaborates,¹⁶ the impossibility of imposing a double penalty for the same act on the same grounds is materially linked to the prohibition of a double assessment of that act. The non bis in idem principle not only implies that two sanctions cannot be imposed for the same act, but also that the same component cannot be evaluated twice, impacting legal classification and, ultimately, sentencing.

5. FINAL FRAMEWORK FOR RESOLVING THE CONFLICT ISSUE

In summary, the outline of the process for resolving the conflict phenomena would be as follows:

- (a) Conflicts arise when the act (or set of acts) under prosecution can be subsumed under several penal precepts.
- (b) The resolution to the conflict issue must aim at covering the maximum possible illegality of the act (the principle of full assessment of the act, correlating with the principle of proportionality).
- (c) Under all circumstances, the *non bis in idem* principle prevents the same act, or part of an act, from being punished or declared illegal more than once.
- (d) Where it is not possible to fully assess the act without violating the non bis in idem principle, both this principle and other principles informing criminal law oblige us to reject any solution that implies punitive excess, thereby necessitating the choice of the solution closest to a full assessment of the act, even if it does not fully cover it.

The assumptions from the previous segment are translated, according to Article 8 CC, into the following procedure when facing a conflict issue:

- (a) Once the existence of a conflict is confirmed, priority is given to addressing the conflict of crimes, ensuring a complete assessment of the act.
- (b) If the classification of the conflict between crimes violates the non bis in idem principle, it's necessary to consider whether the legal classification of the act can be altered in such a way that, while fully assessing it, punitive excess is avoided.
- (c) If it is not possible to avoid punitive excess in the legal classification of a conflict of crimes, the conflict should be treated as rule-based.

¹⁶ García Albero, R., *“Non bis in idem” material y concurso de leyes penales*, Barcelona, 1995, pp. 228–229.

- (d) In the event of a conflict of precepts, the first three rules of Article 8 CC (specialty, subsidiarity, absorption) are prioritized, which typically ensure that the applicable rule covers the entirety of the act's illegality.
- (e) Finally, if it is not possible to identify one of the aforementioned relationships, the rule of alternativity applies; this allows for the most comprehensive assessment of the act possible, even if it is not complete.

II. CONFLICTS OF CRIMES

Respecting the principle of proportionality, conflicts of crimes must be examined before conflicts of precepts, following the priority order established in Article 8 CC. Traditionally, non-legal terminology categorises conflicts between crimes as ideal and real. These terms are almost unanimously adopted in doctrine. Additionally, a third type of criminal conflict is often referenced, known as 'the medial conflict'. A special case, continuous crimes, may also be included in this list, a category initially construed by case law and consolidated in the Criminal Code. In fact, this is essentially the inverse of the combination of crimes, as it involves a plurality of infractions treated by regulations as a single, continuous, offence.

1. TYPES OF CONFLICTS OF CRIMES

A conflict of crimes occurs when a subject commits two or more infractions that have not been prosecuted, and whose joint evaluation and application do not violate the *non bis in idem* principle.

If the plurality of infringements originates from a single act, the conflict is termed *ideal*;¹⁷ if the individual carries out several actions constituting two crimes, then it is considered *real*.

This happens, for example, in the case of an assault on a law enforcement officer resulting in an injury requiring medical or surgical treatment (an ideal conflict of crimes involving assault – Article 550 CC – and injury – Article 147 et seq. CC). In this instance, although only one event has taken place, it is not sufficient to apply solely the crime of causing injury (Articles 147 et seq. CC), as the disruption of public order would go unpunished; nor can it be punished only as an assault (art. 550 CC), as the assault on the officer's health would be disregarded. If the aim is to punish the entire spectrum of illegality of the act, it is necessary to apply both precepts, through a conflict of crimes.

A third type of conflict, termed *medial* or *teleological*, is commonly differentiated. This occurs when a person commits one crime as a means to committing a different one (e.g., falsifying a commercial document of Article 392 CC as a means to deceive another person and make a profit, to their detriment, which constitutes the crime

¹⁷ Cuello Contreras, J., 'La frontera entre el concurso de leyes y el concurso ideal de delitos: la función de la normativa concursal', *Anuario de Derecho Penal y Ciencias Penales*, 1979, p. 73.

of fraud in Article 248 CC). From a material perspective, this is a genuine case of conflict (as there are multiple distinct actions), but the Criminal Code assigns it a particular legal regime (Article 77.3 CC).

As mentioned earlier, the Criminal Code also includes continuous crime (Article 74 CC) among other conflicts of crimes. This is where a plurality of criminal actions or omissions is considered a single criminal offence when it fulfils a series of characteristics.

2. REAL CONFLICT

As has already been indicated, a real conflict occurs when a plurality of acts constitutes a plurality of crimes. This is regulated by Articles 73, 75, and 76 CC.

Article 73 CC sets the basic principle of the legal regime of real conflict as the rule of *Material accumulation of sentences*: all the relevant penalties are imposed for the diverse offences. As a general rule (Article 73 CC), the sentences imposed are served simultaneously, if possible according to their nature and effects (for example, it is possible to do this when there is a custodial sentence and a pecuniary one, but not when there are two custodial sentences). If simultaneous compliance is not possible, as a subsidiary rule (Article 75 CC), the order of their respective severity shall be followed (for which Article 33 CC must be taken into account), starting with the most severe.

Article 76 of the Criminal Code establishes limits to the principle of material accumulation, referred to by legal doctrine as the principle of legal accumulation.¹⁸ The first limit is that the maximum effective sentence to be served by a convict may not exceed triple the time imposed for the most serious of the penalties incurred. The second limit imposes that the maximum may not exceed twenty years although, exceptionally, this limit may be exceeded.

3. IDEAL CONFLICT

A conflict is considered ideal when a single act constitutes two or more criminal offences, such as the example previously mentioned of a conflict between the crime of injury and the crime of assault. The legal regulation is encapsulated in the first two sections of Article 77 CC.

The main dogmatic issue raised by the ideal conflict is defining what a 'single fact' means, a characteristic precondition for this type of conflict. Traditionally, "unity of fact" was equated with "unity of action", addressing the concept of action in its literal sense. For instance, the case of someone planting a bomb (action) and intentionally killing several people (multiple typical material outcomes) would be deemed an ideal conflict scenario (ideal conflict of as many intentional homicides as

¹⁸ Cuerda Riezu, A., *Concurso de delitos y determinación de la pena. Análisis legal, doctrinal y jurisprudencial*, Madrid, 1992.

deaths have been caused). More recently, however, much doctrine (e.g. Roig Torres)¹⁹ has deviated from that traditional understanding and proposed incorporating the concept of fact into the types of material outcome, implying that when *various material outcomes* are typically produced by *a single action*, this gives rise to *multiple facts* (therefore, in the bomb example above, causing multiple fatalities, the legal classification should be that of a *real* conflict of intentional homicides).

This thesis, which has eventually found resonance in the jurisprudence of the Spanish Supreme Court, significantly reduces the scope of evaluation of the ideal conflict, since it will tend to apply only in cases where there are two or more *legal outcomes* (two or more violations of legal rights) but only one (or no) material outcome (the clearest example would be where, as indicated above, injuries to an agent of the authority constitute the crime of causing injury in ideal conflict with the crime of assault).

As for the legal-penological regime of the ideal conflict, Article 77.2 CC applies, instead of the principle of material accumulation, the so-called principle of *exasperation* or, more accurately, *aggravated single penalty* or *absorption with aggravation*: a single but aggravated penalty is imposed. Specifically, according to Article 77.2 CC, the upper half of the penalty for the most severe crime is imposed. However, there is a limit on the duration of the sentence: it cannot exceed the sum of the penalties that would have been imposed if all the offences were punished separately. In other words, either the penalty of the upper half of the most serious crime is imposed or the regime of accumulation of the penalties corresponding to each of the infractions committed is followed, the most benign penalty being the one selected.

4. MEDIAL CONFLICT

A medial conflict is defined in Article 77.1 CC as the case in which one crime is the necessary means for committing another²⁰ (as in the paradigmatic case of the commission of a crime of falsehood of Articles 390 CC et seq. to facilitate the deception forming part of the crime of fraud under Article 248 CC).

Traditionally, the sentencing regime of the ideal conflict had been applied, but Organic Law 1/2015, of 30 March provided a specific formula,²¹ in these cases: a higher penalty will be imposed than that which would have corresponded, in the specific case, for the most severe offence, but without exceeding the sum of the specific penalties that would have been imposed separately for each of the criminal acts. Within these limits, the judge will determine the sentence according to the criteria expressed in Article 66 of the Criminal Code, and, in any case, without exceeding the limits of the terms provided for in Article 76 of the Criminal Code.

¹⁹ Roig Torres, M., *El concurso...*, op. cit., pp. 19, 136, 148.

²⁰ Joshi Jubert, U., 'Unidad de hecho y concurso medial de delitos', *Anuario de Derecho Penal y Ciencias Penales*, 1992, passim.

²¹ Obregón García, A., 'La reforma de la penalidad del concurso medial regulada en el artículo 77.3 del Código Penal', in: Bustos Rubio, M., Abadías Selma, A., *Una década de reformas penales*, Barcelona, 2020.

5. CONTINUOUS CRIME

A continuous offence consists of several acts, which, although in principle constituting as many criminal offences, are considered a single criminal act. Thus, for example, the domestic worker who over fifty days pockets over ten euros a day from the house where they are employed would be committing a continuous crime of theft under Article 234.1 CC, or the estate agency that sells flats to several individuals without intending to actually build them, would be committing a continued crime of qualified fraud under Article 250 CC.

Continuous offences are regulated by Article 74 of the Criminal Code. That provision sets forth the following requirements for an offence to be evaluated as such:²²

- (a) Objective: the execution of a plurality of actions or omissions that infringe upon one or more subjects.
- (b) Subjective: the actions must result from a preconceived plan or the conscious use of an objectively identical situation.

The subjective element gives a unitary meaning to the plurality of acts committed by the subject and, therefore, allows the whole to be considered a single infringement.

- (c) Normative: the actions or omissions must violate the same penal precept or precepts of a similar nature (in accordance with the legal right protected by those precepts).
- (d) Negative: Criminal continuity cannot be applied in offences affecting eminently personal legal rights (for example, life or health), except for infringements against sexual freedom, indemnity and honour affecting the same passive subject or victim. In these cases it is possible to apply the category of continuous crime if it is relevant according to the nature of the act and the precept violated.

If the aforementioned requirements are met, and a continuous crime is found to exist, the penalty corresponding to the upper half of the most serious offence is imposed. The judge may raise the penal framework to the lower half of the higher penalty in degree (Article 74.1 CC).

The continuous crime was initially conceived as a pietistic institution.²³ Despite its association with the judicial discretion characteristic of pre-codification times, it firmly took root in case law practice, which led to the continued use of this category in modern times, even before being regulated by the Criminal Code. This legal institution was not formally introduced to the body of law until 1983. Nonetheless, in its current legal regulation the consequence of appreciating a continuous crime, compared to the regime that would be applicable if this concept did not exist (that of the real conflict of crimes), is not always beneficial for the defendant, and may even be harmful in many cases.

²² Caruso Fontán, V., *Unidad de acción y delito continuado*, Valencia, 2018.

²³ Obregón García, A., Gómez Lanz J., *Derecho Penal...*, op. cit., p. 315.

III. CONFLICT BETWEEN CRIMINAL RULES

The legal doctrine debates whether the expressions 'conflict of rules' and 'conflict of laws' are equivalent or whether it is more correct to use one or the other exclusively. In practice, they are mostly used interchangeably. In recent years, the doctrine specializing in the theory of conflict seems to favour the phrase 'conflict of laws'.²⁴ However, 'conflict of rules' is so deeply embedded that its use is possibly equally admissible and may even be preferred.

As indicated in the first paragraph of this subject, a conflict of rules, according to Article 8 CC, is subsidiary to the combination of offences. It is characterised by selecting from the set of coexisting rules, the one ensuring maximum (and, if possible, complete) coverage of the illegality of conduct with criminal relevance. To properly select this rule, Article 8 CC provides a set of criteria guiding this choice.

It should be borne in mind that, under Article 9 CC, Article 8 CC is also applicable to special criminal laws. Therefore, conflicts between special criminal laws, and between special and common criminal laws, are governed by the rules contained in Article 8 CC.

1. THE CONCEPT OF CONFLICT OF CRIMINAL RULES

The conflict between criminal rules or laws occurs when an act falls under two or more penal precepts, but the assessment of a combination of crimes having been ruled out, only one of those precepts is effectively applied, displacing the For instance, as mentioned above, if one person kills another with malice aforethought, either Article 138 CC (homicide) or Article 139 CC (murder) might apply. However, in reality, the latter prevails, because applying both infringements would clearly lead to a breach of the *non bis in idem* principle, and murder captures more of the illegality of the act than homicide (for it includes not only killing a person but also malice).

As stated earlier, the fact that one rule of the coexisting rules prevails over the others leads most who consider this doctrine to term this conflict of rules as an 'apparent' conflict of laws. Nevertheless, it is important to note that, all things being equal, in these cases there is also a genuine conflict, as far as the factual assumption is subsumed by several different rules, which may have an effect on the determination of the penalty (as demonstrated later regarding the relationship of alternativity) or even on the legal classification itself.

2. DIFFERENT RELATIONSHIPS BETWEEN CRIMINAL RULES

Article 8 of the Criminal Code conflicts between criminal rules. Except for rule 4, which is subsidiary to the others,²⁵ it cannot be categorically stated that the enumeration in Article 8 CC is in priority order. However, the doctrine emphasises

²⁴ Escuchuri Aisa, E., *Teoría...*, op. cit., pp. 67–68.

²⁵ Castelló Nicás, N., *El concurso...*, op. cit., p. 189.

the pre-eminence of the rule of specialty, not only because it appears first in the precept but mainly because, to a certain extent, it forms a criterion inspiring the others.

A) Specialty relationship

This relationship occurs when one law (*special*) adds or incorporates one or more features into the basic components of another law (*general*). If both rules are in conflict, the special law displaces the general one.

Such is the case of the relationship between homicide and murder: homicide contains the components of 'killing' and 'a person'; murder includes the same and, in addition, malice, price, cruelty, or the intent to facilitate the commission of another crime or prevent its discovery.

This relationship is frequently established between a basic offence and a qualified one or an attenuated offence caused by the former. A clear example of this is found in Article 163 CC: the first paragraph contains the basic offence, Article 163.2 CC a privileged offence and Article 163.3 CC a qualified one.

B) The relationship of subsidiarity

This relationship consists of a law (*subsidiary*) that is applicable only in cases where no other criminal law applies (*principal, primary, or preferred*). Rule 2 of Article 8 CC determines that, if this is the relationship between the rules, the principal law excludes the subsidiary law.

Examples of a relationship of subsidiarity are typically cited between authorship (Article 28 CC), which would be the main rule, and complicity (Article 29 CC), which would be a subsidiary rule, as well as between consummation and attempt. However, in the latter case, most authors understand that there is a relationship of absorption. Other cases can be added (although the doctrine generally does not consider them as a relationship of subsidiarity), for example, the relationship between a transitory mental disorder as an excuse and a fit of rage as a mitigating factor (the mitigating circumstance only applies when a defence cannot be upheld), or the relationship between the aggravating factors of malice (Article 22.1 CC) and abuse of power (Article 22.2 CC), since the aggravating factor of malice is appreciated when the active subject uses means that *annul* the victim's defence, while abuse of power is contemplated when the victim's defence is only *weakened*.

C) The relationship of absorption

In this relationship, the illegality punishable by a criminal law (*the absorbing law*) covers, within its meaning, the illegality of another act covered by another criminal law (*the absorbed law*). The rule resolving this conflict of precepts is that the absorbing law excludes the absorbed law.

Most of the doctrine attributes to this relationship the conflict existing between the types of injury and the coexisting types of danger. An example of absorption could also be the relationship between robbery, the seizure of movable assets using forcible means, defined in Article 237 et seq. CC and the crime of damage. Some of the typical forms of robbery using forcible means (described in art. 238 CC) involve

damage (for example, forcing doors or windows, breaking open cabinets, etc.), which, in general, are understood to be absorbed by robbery. Similarly, the relationship between the minor crime of ill-treatment in Article 147.3 CC and all offences requiring violence as a means of commission (such as robbery with violence in Articles 237 and 242 CC, extortion in Article 243 CC, etc.) is usually considered absorption.

D) The relationship of alternativity

Rule 4 of Article 8 of the Criminal Code establishes that, where two or more criminal precepts are in conflict to classify an act, and neither the rules relating to the coexistence of offences (Articles 73 to 77 CC), nor the rules known as speciality, subsidiarity, and absorption, are applicable, the most serious penal precept will exclude the precepts that punish the act with a lower penalty. This is commonly called the “relationship of alternativity” and it is the relationship established between laws in conflict under this rule. However, this expression, which has no legal projection, is questioned by doctrine. Sometimes it is referred to by describing the content of its consequence (applying the “precept which imposes a higher penalty”).

This rule’s predecessor is found in Article 68 CC-1944/1973, the only rule that, since 1944, expressly regulated conflict of laws in the Spanish Criminal Code. Nevertheless, it did not cease to arouse doctrinal opinions contrary to its existence and content (for example, Rodríguez Ramos).²⁶ Despite the legislator being aware since 1995 of the severe doctrinal criticisms that its predecessor had deserved, it’s important to note that the principle of alternativity, in addition to being the sole principle with roots in our regulatory tradition, has been upheld in the Criminal Code. This legislative persistence should make us think, at least from a dogmatic perspective, that this rule is not dispensable in the system of conflict designed for the criminal law corpus.

According to the doctrine shared by the majority, the legal effect of rule 4 of Article 8 CC would be limited to: (a) correct cases in which the legislator commits technical errors when classifying behaviour (such as failing to express preferential order of application when there is a conflict between two different qualified concepts of the same basic concept, as was the case with the crimes of parricide and murder in the previous Criminal Code, both concepts being qualified regarding homicide, or, in the current Criminal Code, with the qualified types of damage in Articles 263.2 and 265 CC). (b) Resolving hypothetical cases of identity, that is, in the words of Gimbernat Ordeig,²⁷ those where “the two qualifications in conflict cover, not different behavioural aspects, but, exhaustively, all the legal-criminally relevant data”.

In our view, it is necessary to recognise an additional scope of application of the alternativity relationship.

²⁶ Rodríguez Ramos, L., ‘Error reduplicado en la regulación del concurso de leyes’, *Actualidad Jurídica Aranzadi*, 19-2-1998, Vol. VIII.

²⁷ Gimbernat Ordeig, E., ‘Algunos aspectos de la reciente doctrina jurisprudencial sobre los delitos contra la vida’, *Anuario de Derecho Penal y Ciencias Penales*, 1990, p. 437.

As we have stated, when the conflict between offences is ruled out, it is necessary to examine the applicability of the first three rules of Article 8 of the Criminal Code (specialty, subsidiarity, and absorption). All of them have the same criterion as their starting point (hence their equal status in the system): a rule is considered preferred regarding other coexisting rules (because it is special, principal, broader, or more complex). In other words, it is a precept that fully includes, in one way or another, the remaining precepts with which it is in conflict. However, determining this preference isn't always feasible since the preconditions for qualifying one of the precepts as special, principal, broader, or complex are not met.

This phenomenon occurs, in our view, when two rules contain common elements but differ from each other in their special elements, and the factual situation contains all the elements (both the common and the special elements of each rule). In schematic terms, the conflict would be described as follows: the fact covers the legally relevant elements A, B, and C; one of the precepts includes elements A and B, and another includes elements A and C. The inclusion of element A in both provisions, if that element significantly affects the legal right, precludes the application of a conflict of crimes due to a breach of the non bis in idem principle. However, neither of the rules is special, and unless a relationship of subsidiarity or absorption can be recognised (which is difficult when the provisions have common and special areas), applying one of them must necessarily be rejected.²⁸

Thus, for example, if an individual seizes a movable asset belonging to another for profit against the will of its owner by applying force to objects and also using intimidation, the act cannot constitute two offences (robbery by forcing objects and robbery with intimidation), even though no criminal law includes all the relevant elements of the case (there is no autonomous concept of "robbery with intimidation and applying force to things"). This would mean accepting the existence of two robberies (of two attacks on property) when, obviously, only one can be considered to have been committed. But, also, as has been indicated, one of the rules in conflict cannot be identified as preferred, since neither of the two types of theft typified by Article 237 CC can be considered special, principal, or broader.

Therefore, rule 4 of Article 8 CC acquires validity precisely in these cases of interference (referred to by some Italian legal doctrine theorists as 'bilateral or reciprocal specialty', and which we could also call imperfect specialty). In these cases, the precepts in conflict describe a substantial part of the fact without completely covering all its components.

Let us examine other examples closely.

Although the wealth of facts that can occur in reality does not lend itself to definitive categorisation, we believe that at least the following groups of cases can be addressed by this rule:

²⁸ Obregón García, A., 'Los llamados concursos de leyes en relación de alternatividad: sentido y contenido de la regla 4ª del artículo 8º del Código Penal', *Revista ICADE*, 2008, No. 74, p. 79.

- (i) A first set, which doctrine usually directs towards the principle of alternativity (except when it considers that a conflict of crimes must be apprehended),²⁹ consists in the coexistence of several qualified concepts – or of several *sui generis* crimes – deriving from the same basic concept. The described scheme is clearly met: the common zone A is defined by the elements that make up the basic type, while the special elements of each coexisting criminal legal concept (B and C) will be constituted by the incidental elements that differentiate the qualified type from the basic one; these elements, obviously, are different from each other because they are different qualified types.
- (ii) Secondly, the relationship of conflict between a principal offence in the degree of attempt and the corresponding subsidiary offence in a degree of consummation (for example, attempted homicide in competition with consummated injuries), conflicts that normally continue to reside in the principle of subsidiarity (again: unless an ideal combination of crimes is apprehended), or between a qualified type in the degree of attempt and the corresponding basic type in the degree of consummation. In all of them the abovementioned scheme may be appreciated: the common element (or common elements) defined by the partial – but substantial and relevant – coincidence in the typical action of the qualified type and the basic or the principal and then the subsidiary, while the special elements correspond, on the one hand, to the typical element that reveals the consummation of the type (subsidiary, basic) and, on the other, with the particular will to consummate the type (main, qualified).
- (iii) Similarly, hypothetical situations arising in irregular cases where there is a relationship between the typification of danger and the correlation of injury (for example, between the crime of omission of a duty of care of Article 195 CC and the crime of homicide or injuries committed by omission: between forgery of a private document of Article 395 CC and fraud in Articles 248 and 249.2 CC; or between crimes against road safety and crimes with a supervening harmful outcome (except as provided in Article 382 CC)), can also be included in alternativity (although they could be considered as very close to the cases above). In these cases, it may happen that, if the rule by which the type of injury displaces the type of danger is applied (most of the doctrine, as indicated, understands that this is a relationship of absorption), this could give rise to a ‘sentencing paradox’, since danger is sometimes associated with a more severe punishment than injury (this could easily be the case, where the latter constitutes a misdemeanour). This erratic outcome is an indication that the relationship must in reality be defined as one of alternativity, usually motivated because danger may additionally affect other legal rights which injury does not (without it being possible to classify it as a conflict of crimes because danger and injury to the same legal right would be punishing twice, a partial *bis in idem* and sometimes minimal, but in any case, significant).

²⁹ Mir Puig, S., ‘Sobre la relación entre parricidio y asesinato’, in: De la Cuesta, J.L., Dendaluz, I., Echeburúa, E. (eds), *Criminología y Derecho penal al servicio de la persona: libro-homenaje al Prof. Antonio Beristain*, San Sebastián, 1989, p. 830.

Unlike the other criteria listed in Article 8 of the Criminal Code, applying the rule of alternativity implies, in principle, that there will be dissatisfaction resulting from explicitly admitting that part of the illegality of the act (which corresponds to the special elements covered only by the displaced provision) will not be covered by the precept applied (that of a greater penalty), with the consequent disturbance in compliance with the principle of full assessment of the fact. However, at least this rule ensures that the greatest possible amount of illegality is covered.

Moreover, it is not too audacious to propose that one way of compensating for the fact that the (il)legality of the act is initially incomplete is to take into account when determining the penalty – within the criminal framework associated with the most serious provision – those elements of the displaced provision that are not contained in the applicable provision (as aggravating factors or, more precisely, factors increasing the severity of the object assessed and, consequently, of the penalty).

As mentioned above, rule 4 of Article 8 CC does not typically receive doctrinal favour.³⁰ However, having analysed its meaning in the manner set out above, it is not unjustifiably burdensome on the defendant, but rather is essential to complete the system of conflict as a closing clause for the latter and one which seeks to achieve proportionality in the ‘amount’ closest to fairness, without punitive excesses. In other words, to resolve those hypothetical cases that have been raised in detail, there is no better alternative than what is called alternativity.

IV. CONCLUSION

The progressive expansion of Criminal Law, in its various manifestations, has heightened the importance of criminal conflicts. As new criminal offences proliferate, it is challenging to imagine a factual situation that would not fall under several criminal rules. Therefore it is necessary to determine which, if any of these rules are applicable.

The problem of resolving conflict has often been addressed based more on intuition than according to logically founded criteria. However, in the case of Spanish Criminal Law, the Criminal Code provides a series of fundamental elements that compose a system. Compliance with this system allows us to resolve any case involving the coexistence of several rules. allows us to resolve any case involving the coexistence of several rules. However, since this system is inspired by general principles of Criminal Law, widely accepted in the European and Latin American legal environment, it is possible to consider it may be valid for any system where these principles are recognised.

Specifically, the system for resolving conflicts must start by reconciling the two principles that constitute a guide and limit to the *ius puniendi*: on the one hand, the principle of proportionality, which calls for a full assessment of the act and its consequent conversion into an extension of the penalty, and on the other, the *non bis in idem* principle, which prevents assessing the same fact, or part of the same act,

³⁰ Aguado Correa, T., ‘Nuevas tendencias jurisprudenciales en las relaciones entre los delitos de tráfico de drogas y contrabando’, *Revista de Derecho Penal y Criminología*, 2000, No. 5, p. 260.

twice, for the purpose of determining the appreciable offences and the penalty to be imposed. The rules for resolving conflict derive from applying both principles, which, in summary, must seek to ensure that any determination of the applicable rules covers as much of the illegality of the punishable act as possible, but without producing punitive excesses resulting from duplicate assessments of the facts.

Thus, two essential conflict mechanisms appear: one, the conflict of crimes, an expression with which we identify the operation of accumulation of infractions (of the rules describing them), aiming to cover the entire illegality of the act. And another, the conflict of rules (or laws), a phrase we use to designate the operation of delimitation of the applicable norm, which covers the greatest possible illegality of the act, when accumulating rules is not legitimate because it breaches the *non bis in idem* principle.

The system is supplemented by the rules for determining the relevant penalties to address the gravity of the acts with a precise extension of the penalty, in the case of conflict of crimes, and with the rules aimed at identifying precisely the specifically applicable precept, in the case of a conflict of rules. In all instances, an elementary rule must always be adhered to, namely that the penalty resulting from the conflict may not be below that which would have been imposed for the most serious coexisting offence, nor may it exceed the sum of the penalties for all the coexisting offences. Perhaps, in order to avoid those inconsistencies that sometimes occur when we are setting rules that are intended to be more precise, it is this elementary rule that should be enshrined as a fundamental criterion for imposing a penalty where there is conflict, leaving room for judicial discretion for the final determination of the exact penalty, in light of all the circumstances of the case.

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