



Is Prevention Better than Cure? The Ever-increasing Criminalisation of Acts Preparatory to an Offence in Spain

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Abstract

This paper critically analyses the quantitative and qualitative increase in the punishment of conduct preparatory to an offence displayed in recent times under Spanish criminal law. It demonstrates that this phenomenon, which is consistent with the international trend to further advance the punitive line of defence, is driven largely by the objective of punishing individuals based on their dangerousness rather than on the harm caused by their specific acts. It also highlights the serious risks that this implies for the principles underlying any democratic state governed by the rule of law. Finally, the article outlines the rationale for and the limits on the punishment of preparatory acts, which, in the author's view, should apply on a general basis to such punishment if those risks are to be avoided.

Keywords

Inchoate offences; preparatory offences; preventive criminal law; criminal dangerousness; pre-crime.

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Introduction

It has often been said that the degree of criminalisation of preparatory acts is a reliable indicator of the extent of the liberal nature of a criminal law system.¹ In principle, modern criminal law starts from the liberal premise that the boundary line for punitive action is crossed at the point at which the criminal act begins (attempt). On this basis, the majority view has traditionally been that acts preparatory to an offence should only be punished in very exceptional cases.² It has been emphasised that this limitation on punishability seeks to ensure that the danger to the legal interest has begun so that the criminal law can intervene and that it thus constitutes a requirement derived from the principle of proportionality.³ It has also been said that even though its historical source is linked with liberalism, the general rule of impunity for preparatory acts should also be viewed as an inherent requirement of a social and democratic state governed by the rule of law.⁴ In recent times, this model has been seriously called into question by the criminal policy trends that hold sway at the international level and that are characterised by a maximum emphasis on the notion of security and an exaggerated focus on punishment.⁵ Against this background, we are witnessing the increasing criminalisation of preparatory conduct.

The present study first seeks to draw attention to the striking extension of this phenomenon and second, to show that the penalising of many of the preparatory offences included in our legislation are based on the dangerousness of the actor rather than on his or her specific acts and to highlight the dangers that this poses for the basic principles of criminal law on which any democratic system should be founded. Finally, these considerations are used to draw some conclusions regarding the proper basis for the punishment of preparatory acts and the limits that should apply. The analysis draws mainly on the example of Spanish positive law; however, it also gives some consideration to the Anglo-American system and Italian, German and European Union (EU) legislation. Criticisms directed at Spanish law and the proposals for legal reform outlined in this paper should be, as we shall see, largely extrapolated to those other legal systems.

The Spread of Preparatory Offences

Spanish law provides a clear example of the tendency of present-day legislators to criminalise preparatory acts. This is the case even though at first glance, it may seem as if the opposite is true, as the Spanish Criminal Code (SCC) is somewhat misleading in this regard.

The above assertion requires some explanation. Under the provisions in Book I or the General Part of the SCC, the scope of preparatory acts is restricted in two ways. First, Book I of the SCC criminalises only three specific preparatory acts (each of which requires the involvement of several individuals): conspiracy, incitement and public provocation (Articles 17 and 18). Second, these preparatory acts are not punished in connection with the generality of offences but only in relation to a restricted list of specific offences.⁶ The legislation thus appears to criminalise such acts only in exceptional cases. Indeed, that is why it is often said that the general principle of Spanish law is that preparatory acts are not punishable. However, if we examine Book II of the Criminal Code closely, which sets out specific substantive offences and which is known in the continental legal system as the Special Part of the Criminal Code, we see that it contains a significant number of offences, which punish forms of behaviour that *in substance* are no more than acts preparatory to other offences. To date, this has not been sufficiently highlighted by Spanish scholarship, most of which, when speaking of the criminalisation of preparatory acts under Spanish Criminal Law in general, refer only to preparatory acts in the General Part of the SCC. Notably, no mention of preparatory acts in the Special Part of the SCC are made⁷ or, at most, where these are mentioned, they are treated as very peripheral.⁸

The preparatory acts in the Special Part of the SCC (which are referred to in this paper as 'preparatory offences') are naturally found in the field of terrorism (Articles 575–579); however, they are also found in other areas of criminality that vary considerably in both nature and gravity, for example: privacy offences (SCC, Article 197.3), sexual offences (Articles 183 ter and 189.1a and b), offences against family rights and duties (Article 232.1), offences against property and socioeconomic interests (Articles 248.2 b), 264 ter, 270.1, 5 and 6, 274.2.2 and 274.4, 286), planning offences (Article 320), offences related to historical

heritage (Article 322), environmental offences (Article 329), forgery offences (Articles 386.2.2 and 400), offences against the Constitution (Article 475) and public order offences (Articles 557.2 and 559). Some of these preparatory offences existed previously; however, many were introduced by the reforms of the SCC Code in 2010 and, more notably, in 2015.⁹ In certain cases, international regulations, in particular those of the European Union (EU), were the dominant factors driving these reforms.¹⁰

Consequently, despite general claims that the criminalisation of preparatory acts is limited under the Spanish system, arguably it is not *that* limited. This is confirmed if we examine some of the traits that characterise the regulations in this area. In particular, I would like to highlight three factors that, in my view, justify the assertion that there has been a genuine expansion of preparatory offences not only in quantitative but also in qualitative terms.

Harm Principle?

Given that the criminalisation of preparatory acts radically extends the boundaries of punitive intervention (in that they are ‘pre-executive’ acts and thus still, as a rule, far from causing harm to a legally protected interest),¹¹ one would assume that such criminalisation should be limited to the most dangerous preparatory conducts and in relation only to the most serious offences; however, this is clearly not the case. The SCC penalises acts preparatory to situations that in themselves amount to criminalisation in advance. Specifically, it punishes acts preparatory to offences of abstract endangerment (e.g., possessing child pornography with the intention of distributing it; see Article 189.1.b), fostering a climate of hatred or violence (e.g., producing material liable directly or indirectly to incite hatred with the intention of distributing it; see Article 510.1.b) and membership (e.g., glorifying the membership of a terrorist organisation; see Articles 578 combined with 572).

A particularly clear illustration of this tendency to *anticipate anticipation* of the punitive protective barrier can be found in the case of preparatory acts that are connected with main offences, which already entail punishment for preparatory conduct. To cite just one of many possible examples, Article 575.3 of the SCC imposes a penalty of up to five years’ imprisonment for the act of travelling to a foreign territory controlled by a terrorist organisation (the first preparatory act) with the intention of (among numerous other possibilities) undergoing training (the second preparatory act) before finally committing any other terrorist offence. Similar provisions can be found in the German Criminal Code (GCC) (section 89a), the Italian Criminal Code (ICC) (Article 270 *quater* 1) and the Directive (EU) 2017/541 on combating terrorism (Article 9).

Another striking and singularly controversial example is the offence of ideological self-indoctrination to commit terrorist offences. Article 575.2 of the SCC criminalises as a specific form of this offence, which attracts the same penalty of up to five years’ imprisonment, the conduct of habitually accessing information via the internet that could be deemed to constitute an incitement to aid terrorism or the acquisition or possession of documents of this nature for the purposes of self-indoctrination to commit any terrorist offence. Arguably, this shifts punitive intervention very close to that of a mere thought or reflection.¹² It should be noted that it is not even necessary to have read the material in question (e.g., the book); it is sufficient merely to be in possession of it with the aim of self-indoctrination to commit any other terrorist offence. And this latter offence may also be another preparatory offence (e.g., where a book is possessed for the purposes of motivating oneself to recruit terrorists or glorify terrorism). Strictly speaking, these cases amount to punishment for preparing to prepare for preparation (or preparation cubed). Further, the law also expressly provides that conspiracy, solicitation and public provocation can be penalised in connection with all of these cases. To continue with the same example, conspiring to purchase the *inflammatory* book would also be punishable. In fact, given the terms by which terrorist offences are regulated in Spain, the chain of preparatory conduct could continue indefinitely and remain potentially punishable, as noted by the Spanish Supreme Court, which in this context referred to the possibility of a ‘continuous loop’ of punishment for preparatory acts.¹³

In a state governed by the rule of law, such a pronounced and generalised advance in the punitive line of defence cannot be justified. It involves punishing behaviours that—no matter how serious the target offence—are still quite some way from violating a legally protected interest. Thus, there is ample scope for the perpetrator to abandon his or her course of action and for the ultimate harm that the legislator is seeking to prevent to fail to materialise.

Given that it is highly debatable as to whether many of these offences in our criminal legislation are actually harmful, one suspects that the reasons for punishing such behaviours are unconnected with the wrongfulness of the particular conduct in question and that the conduct is simply a pretext for penalising something else. In this context, I believe that it is not excessive to use the concept of ‘pre-crime’ to express the idea of punishing what Zedner (2007: 262) refers to as ‘that which has not yet occurred and may never do so’ rather than that which has actually occurred.

This pre-crime logic is open to criticism in circumstances in which the target offences involved are very serious; however, the criticism is even more justified if the approach is applied to far lesser offences, which is also the case. One example perfectly demonstrates this point; in accordance with the regulation of forgery offences (Article 400 combined with Article 386.2.2 of the SCC), it would be possible to punish the mere fact of possessing an item specifically designed to secure and conceal the storage of counterfeit money (such as containers or safe deposit boxes) with the aim of putting said money into circulation in the future. It should be noted that a heavy prison sentence (of up to eight years less one day) could be imposed even if the individual is not in possession of the counterfeit money, but simply has the means of storing it (possession with intent to possess).

Interferences in the Lawful Exercise of Fundamental Rights

In addition to the above, a second factor has contributed to the intensive expansion of preparatory offences: that is, the imprecise way in which these offences are often formulated. Logic demands that the general requirement for certainty in the drafting of legislation (which, as is well known, applies particularly to criminal legislation) would be even greater where the behaviour in question is very far removed from harming the interest that is protected under the law and where, in some cases, the behaviour very closely borders the legitimate exercise of fundamental rights. However, once again, this is not the case.

The risk of violating the ideological freedom or the legitimate right to receive information is readily apparent in the example of the offence of indoctrination cited above. As the Spanish courts’ problematic application of the offence shows, the very notion of ‘indoctrination’ is already inherently very slippery and the interpretation of it is open to abuse.¹⁴ A similar situation arises in relation to freedom of expression with regard to the various forms of apologia offences that exist under the SCC.¹⁵ In particular, the interpretation of the offence of glorification of terrorism applied by the Spanish courts in recent years has, under the cover of a questionable understanding of the (malleable) doctrine on hate speech, led to rap artists and Twitter users being convicted for publishing lyrics or slogans that, when assessed objectively, are highly unlikely to generate a risk of increasing future terrorist offences that is of even minimal relevance.¹⁶

Similarly, the public disorder preparatory offence established by Article 557.2 of the SCC is an example of the tension between punishment and freedom of expression (as well as the right of assembly and the right to demonstrate). Under Article 557.2, it is punishable simply to ‘incite’ (the incitement need not be direct) or, what is far worse, to ‘strengthen the determination’ of others to commit public disorder. Consider the case of someone who does no more than make an impassioned speech about the injustice of a situation (e.g., a tax rise or any other type of situation) that prompts a protest march. Unlike the traditional legal requirements of apologia offences, in this case, the behaviour does not even have to glorify the crime or the perpetrator. Thus, it could easily be concluded that even if the speech contained no explicit or implicit reference to the use of violence, it was capable of *strengthening* a disposition to commit public disorder among a group of demonstrators who had already gone to the march with the intention of committing acts

of violence. This would be enough to justify a prison sentence of up to 6 years (Article 557.2 combined with Article 557 bis.3). As we are dealing with the punishment of a preparatory act, there would be no need for any public disorder to have actually occurred or even for the slightest indication of the beginnings of unrest to exist. It seems no coincidence that the legislative initiative that led to the approval of this new offence occurred in 2012, when, prompted by the economic recession and the resulting social cutbacks, street protests were at their height in Spain¹⁷.

In any event, the Spanish legal system has not yet reached the degree of imprecision found in other legal systems in relation to the definition of preparatory offences. For example, section 5 of the *United Kingdom Terrorism Act 2006* criminalises ‘any conduct in preparation’ for committing terrorist acts¹⁸ while section 234a(3) of the GCC punishes ‘whoever prepares’ the offence of abduction abroad.¹⁹ Similarly, Article 9(2)(b) of the EU Directive (2017/54) on combating terrorism requires Member States to define as a criminal offence ‘preparatory acts’ undertaken by a person entering that Member State with the intention to commit or contribute to the commission of a terrorist offence.

The Inordinate Severity of the Punishments

The lack of proportionality in the punishments laid down by the law constitutes the third factor, which, in my view, makes it possible to talk—in this case, particularly decisively—of a qualitative increase in preparatory offences. In this respect, it should be noted that the punishment for the preparatory offence is often the same as the punishment for the consummated target offence (as opposed to the preparatory acts in the General Part of the SCC, such as conspiracy, incitement and public provocation, which are punishable by a penalty one or two degrees below that which applies to the consummated target offence). For example, in relation to two of the offences discussed above, possessing the means to commit forgery attracts the same penalty as forgery itself and the penalty for inciting public disorder is the same as that for actually committing a public order offence. However, worse still, in some cases the preparatory offence is punished more harshly than the completed main offence. For example, under the SCC, raising funds to finance a tribute to a terrorist could lead to a sentence of imprisonment of up to 10 or 15 years (Article 576. 1 and 2), while the maximum penalty for glorifying terrorism is three years (Article 578).

Notably, Spain once again stops short of the extremes found in the Anglo-Saxon legal sphere, where sentences for preparatory offences are equated with those for the main crime even when this is punishable by life imprisonment. For example, in the United Kingdom (UK), this includes cases of conspiracy (section 3[2] of the *Criminal Law Act 1977*), encouraging or assisting crime (section 58[2] and [5] of the *Serious Crime Act 2007*) and the abovementioned offence of preparation of terrorist acts (section 5[3] *Terrorism Act 2006*).

The disparity between the seriousness of the criminal act and the punishment does not only seem unjustifiable from a value perspective, but may also be viewed as counterproductive in criminal policy terms. The fact that the very preliminary stages of a criminal process attract the same punishment as the commission of the completed offence (or in some cases, an even harsher punishment) could give the perpetrator an additional reason to continue down that road and commit the offence itself. Further, the fact that behaviours of such varying degrees of seriousness receive the same penalty makes one suspect that what is being punished here is not the gravity of the behaviour (or the actual degree of harm done to a legally protected interest) but the *dangerousness of the perpetrator*.

Inchoate Offences, *Quasi Reati* and Actor-based Criminal Law

In other arenas, the former point is very openly accepted by some scholars. For example, when it comes to the criminalisation of inchoate offences (e.g., attempt, conspiracy and solicitation), one of the primary purposes of the criminal law identified by those responsible for drafting the United States (US) Model Penal Code (MPC) is to combat the ‘special danger’ represented by individuals who, in displaying conduct designed to culminate in the commission of a subsequent offence, indicate that they are disposed towards such activity ‘not alone on this occasion but on others’.²⁰ Thus, it is not surprising that the drafters have

declared such offences to be ‘comparable in magnitude’ to the completed crimes that are their object²¹ and that as a general rule, the penalties for all inchoate offences are the same as for the corresponding completed target offences.²² Indeed, they explicitly justify this grading system by arguing that to the extent that sentencing depends upon the ‘antisocial disposition of the actor’ and the ‘demonstrated need for a corrective sanction’ there will usually be little difference in the gravity of the required measures depending on the consummation or the failure of the plan.²³ However, that is not all. In the same vein, in the debate over the principles that should underpin the penalties for attempted offences, some have argued that the need for punishment may be even greater for attempted offences than for completed offences. The argument seems to go something along the lines that because the attempter—unlike the perpetrator of a completed offence—has yet to achieve his or her objective, as he or she has not yet completed the object of his crime, he or she may be particularly dangerous if unconfined.²⁴ Thus, there is a clear endorsement of the notion that in these cases it is a matter of reacting against the perpetrator and his or her dangerousness, rather than against his or her specific conduct.²⁵ This line of thought is consistent with what continental European legal systems normally term ‘actor-based criminal law’. Under this model, which is at odds with an act-based criminal law, individuals are punished not so much for what they have done than for what they are.²⁶

This type of reasoning can be seen even more plainly in what are known as *quasi reati* (quasi-offences)²⁷ in the Italian system. The ICC makes provision for the conduct of *accordo* to commit an offence (conspiracy) and *istigazione* (solicitation/incitement) in connection with the generality of crimes and establishes that their legal consequence is a security measure (Article 115) whose fundamental premise is based on what, from the very outset, is referred to in law as ‘social dangerousness’ (Articles 202 and 203). Thus, there is an explicit acknowledgement that this is a reaction to the dangerousness of the individual (irrespective of whether or not that individual is accountable). From this perspective, in relation to *quasi reati*, the objective dangerousness of the act ceases to have any relevance in determining the legal consequence to be applied (the security measure). The conduct itself (conspiracy or solicitation) that, let us not forget, the law classifies as *non-criminal* thus becomes merely an opportunity to assess whether the individual displays the symptoms of a socially dangerous person and the dangerousness of that individual is the deciding factor in determining the punitive response.²⁸ Vasalli (1987: 36) articulated the basic underlying idea as follows: an act that is criminally insignificant can give rise to genuine criminal dangerousness. All of this is evidence of the deep mark left by the Positivist School, which again connects with the model of actor-based criminal law, on the regulation of this subject in the ICC.

Pre-punishments and Would-be Criminals

Despite a lack of general acknowledgement in the Spanish context, I believe that once we go beyond mere labels and begin to examine what actually occurs in practice, it can be argued that the penalties for a significant number of preparatory offences operate in large measure as a kind of *pre-crime security measure* or that they are a *pre-punishment* to be imposed on a *would-be criminal* (to use the terminology coined by Philip K Dick in his cult short story *The Minority Report*)²⁹. Indeed, in my opinion, the fact that in many cases the penalty for the preparatory act is the same as that for the future act (or target offence) inevitably points to that idea of punishment in advance. Or, to put it another way, it shows that this is a reaction to a future event and that it is designed to neutralise the perpetrator’s dangerousness, regardless of the extent to which it hides behind the pretext of an external event, which, as argued above, is either completely harmless or if it does cause harm, is not nearly harmful enough to justify the penalty that is imposed.

As Robinson (2001) and Husak (2011) have contended, we must lift the cloak. However, one cannot uncover a state of affairs only to go on to accept it,³⁰ even within the confines of certain (supposedly) restricted parameters (i.e., parameters that would shape an enemy criminal law, a ‘criminal law in a third gear’ or a variant of the laws of war).³¹ Nor, in my view, should any such unclinking lead to the legitimacy of preventive detention being alternately applied to other areas of the legal system (outside the criminal law).³² We should instead be arguing for the repeal of a legislative reality, which, in Spain at least, we are

generally prepared to accept when it is ‘dressed up’ as a penalty for a preparatory offence, but which we would surely find much harder to accept if we were to call it by its real name (i.e., a pre-crime security measure or a pre-punishment). This would make it clearer that in such cases, ‘the sentence precedes the trial’.³³

In this context, it is also important to take into account the fact that in these cases, the assessment of dangerousness is not even being entrusted to the courts and subject to their vague predictions of risk with which we are generally uncomfortable precisely because of the uncertainty that, at the present time, they necessarily generate. Rather, the legislature is making a direct presumption of dangerousness that could be termed as a kind of ‘legislative prediction of dangerousness’, which is not subject to review. This naturally encourages the application of the punitive response laid down for such cases; however, it also enables us to argue that in such circumstances, criminal law is not reacting to the ‘actual’ dangerousness of a specific individual but reacting, first and foremost, to a particular *type of offender* (who is assumed to be dangerous).³⁴

Security measures imposed on the basis of an individual assessment of the dangerousness of the perpetrator have been criticised for being arbitrary, as the forecasting techniques used are incapable of predicting dangerousness with a sufficient degree of certainty and thus their potential as an effective means of combating crime has rightly also been called into question.³⁵ The criticism is all the more justified where, as occurs here, individual predictions are abandoned in favour of a direct presumption of dangerousness. Thus, it could be said in this case that the response of the legal system is not merely a pre-crime measure, but that it is also arbitrary and inefficient. Further, we must not lose sight of the fact that the punishments involved are not trivial. Indeed, all such punishments involve custodial sentences that can be lengthy; for example, terrorist self-indoctrination (Article 575.2 of the SCC) carries a sentence of up to five years, recruiting terrorists (Article 577.2) carries a sentence of up to ten years, funding terrorist offences (Article 576.2) carries a sentence of up to 15 years and public incitement to commit terrorist offences that may lead to someone’s death (Article 579.1 combined with Articles 573.1 and 573 bis) carries a sentence of up to 30 years.

Given this state of affairs, I believe that it is no exaggeration to state that contemporary criminal law is proceeding down a very slippery slope that leads to a ‘preventive’ and ‘arbitrary’ state. Pursuant to Denninger’s formulation (1988), under a ‘preventive’ state, ‘legal security’ would be replaced ‘with security for legally protected interests’. On this basis, and in view of the advance in the penal line of defence that characterises contemporary criminal legislation and today’s legislators’ marked determination to criminalise the future, Vives Antón and Cuerda Arnau (2016: 368–370, 380–381)³⁶, believe, and I agree with them, that it is possible to speak of an evolution towards a ‘preventive’ or ‘authoritarian’ state and from there, towards an ‘arbitrary’ state.

In support of this assertion, in addition to the arguments already put forward, I should now like to add two further observations. First, in general, the penalties for preparatory acts in the Special Part of the SCC are far more severe presently than they were during the Franco era, when the general rule (subject to a few exceptions) was that penalties for such offences were considerably lower than the penalty for the completed main offence. I shall provide just one (illustrative) example. Under Article 248 of the 1944 SCC, the public order offence of shouting with the aim of inciting rebellion or sedition in public places or carrying flags that *directly* provoked public order disturbances carried a prison sentence of between one month and one day and six months. Under the SCC as it now stands, acts that are defined far more flexibly and which, as we have seen, involve less provocation (e.g., strengthening the disposition of others to commit public order offences) carry sentences of up to three years’ imprisonment, which can easily reach six (the same sentence as that imposed for completed public order offences in their respective basic and aggravated forms). In this regard, it should also be noted that in Spain, over the last two centuries, *apologia* offences were hardly ever used; however, today the glorification of terrorism is one of the most commonly applied *terrorism* offences.³⁷

Second, with regard to the aforementioned slippery slope, we cannot ignore the fact that in other legal systems (e.g., the British legal system), the primary inchoate offences (attempt, conspiracy and encouraging or assisting crime) are punished on the basis of a non-exclusive list of offences,³⁸ the number of preparatory or pre-inchoate offences is clearly on the rise³⁹ and, moreover, the practice of imposing the same penalties for preparatory conduct (in general) and completed offences is fairly widespread. As stated above, this last element has reached the stage at which conspiracy is punishable by life imprisonment, as are other general inchoate offences that have vague formulations, such as ‘encouraging or assisting crime’.⁴⁰ Taking a broader perspective, it should also not be forgotten that this race to combat criminal dangerousness has also given rise to measures, such as preventive orders, being applied in very diverse situations and various forms of preventive detention.⁴¹ In some cases, these measures involve major restrictions on freedom and, as has often been said, they are in fact criminal measures that have been smuggled in under the guise of administrative measures or civil confinement.⁴²

In reality, the Spanish legal system also contains other examples (over and above the criminalisation of preparatory acts examined in this paper) that show that criminal law that is first and foremost oriented to neutralising the perpetrator’s dangerousness is on the rise. This is the case with supervised release, which was introduced into the SCC in 2010 and subsequently extended in 2015, and which was conceived as a security measure that could be added on to the punishment (proportionate to the seriousness of the offence) of the accountable perpetrators of specific offences (e.g., sexual, domestic violence or terrorism offences). It also applies to what is referred to permanent reviewable imprisonment, which was created in 2015 for very serious offences (e.g., first degree murder and types of terrorism or genocide that involve the death of an individual) and which is *de facto* assimilable to life imprisonment.

Some Conclusions

First, as contended at the beginning of this paper, this study has shown that we are witnessing a quantitative and a qualitative expansion in preparatory offences. It has also shown that this expansion is incoherent (as given the highly diverse offences affected, it is not based on a clear criminal policy criterion), is in breach of constitutional criminal guarantees (e.g., the act requirement, the harm principle, the nature of criminal law as a recourse of last resort and the proportionality principle) and curtails fundamental rights (e.g., freedom of expression and of political criticism). The expansion is thus clearly *illegitimate*.

Second, and closely linked to my first conclusion, it can also be said that our legal systems contain more actor-based criminal law than is initially apparent and that the laws governing many of the preparatory offences are a good example of this. This fact clashes with the theoretically well-established notion (generally shared in continental legal systems, such as that in Spain) that current political and constitutional frameworks require an act-based criminal law. The Spanish Constitutional Court itself has expressly stated that ‘an actor-based criminal law, which sets punishments on the basis of the individual’s character and not according to his or her culpability with regard to the offences committed, would not be constitutionally valid’.⁴³ However, neither Spanish academics nor case law are proving particularly militant *vis-à-vis* the proliferation of preparatory offences that we are seeing,⁴⁴ in spite of the fact (and this idea needs to be stressed) that, no matter how well camouflaged, they are largely manifestations of actor-based criminal law.

I align myself with those who believe that under the criminal law of a state governed by the rule of law, it is the gravity of the act that should determine both the justification for and the extent of the punishment. Otherwise, it would be acceptable to impose criminal penalties on behaviours that have no significant effect on the freedom of others to the detriment of individual autonomy and human dignity. According to Article 4 of the Declaration of the Rights of Man and of the Citizen, ‘(l)iberty consists of doing anything which does not harm others’. Consequently, as explained by Ferrajoli (2016: 121), ‘if freedoms and human dignity are also to be safeguarded, only harmful actions can be criminalised, not harmful individuals’. As we have seen, such an approach risks blurring the boundary between ‘law’ and ‘morality’ and could end in ideological persecution. The use of the most repressive instrument of social control available to the state

should not be governed by the criterion of the dangerousness (whether more or less undetermined or directly presumed) of the perpetrator. The spectre of the perpetrator—stripped of citizenship, turned into the enemy and treated purely as a potential source of crime to be neutralised—hangs clearly over this entire approach.⁴⁵ To put it another way, the preparatory offences we have been discussing here are, in effect, enemy criminal law.

As Robinson (2008: 93) reminds us, '[i]f desert does not constrain the criminal justice system, then liability and punishment can be distributed in any way that the crime-control calculus suggests may reduce crime'.⁴⁶ Thus, once that boundary has been crossed, in the name of prevention and the security of society, *anything goes*. History proves this point,⁴⁷ as does the current evolution of the criminal law described above in relation to the regulation of acts preparatory to an offence.

This paper also noted that the increasing tendency to extend criminalisation into the arena of preparatory acts is not restricted to Spain. It is present in the British and Italian legal systems and under the regulations of the US MPC. Further, if we consider the German system⁴⁸ or European regulations,⁴⁹ the same conclusion can be drawn: the trend is clearly on the rise. The criticisms levelled in this paper apply equally to these other legal systems. In some cases, as discussed above, they can even be taken further, particularly in relation to the lack of specificity in the drafting of the law and the excessive severity of the punishments.

In my view the panorama of the criminalisation of preparatory acts (as identified in this paper) provides an excellent illustration of the model of criminal law towards which, from a more general perspective, we are moving; that is, a criminal law that punishes citizens for their bad intentions or because of what they are like rather than for what they have actually done. A type of criminal law that is strongly policing-based and that has an insatiable appetite for expansion both horizontally (i.e., by the creation of new substantive offences) and also, as Ashworth (2018: 1–3, 9) noted, vertically (i.e., by the addition of extra layers of criminal responsibility being 'piled on top of the basic wrong'). In short, a criminal law that is increasingly governed by the idea of unbridled prevention. Let us not forget (and this must be stressed) that the regulation I have described is not conceived as something to be used only in exceptional cases and to be applied only to incorrigible habitual or permanent offenders or to terrorists or sexual predators. It also applies to rowdy protestors, to tweeters and rappers who generate provocative material in poor taste or to people involved in petty forgery or fraud, none of whom need necessarily be repeat offenders to be punished on purely preventive grounds or subject to such harsh penalties.

Thus, it would seem that present-day legislators are blindly following the maxim that prevention is better than cure. However, the question arises: Is this acceptable from a criminal law standpoint? The answer is clearly, 'no', but not because there is no place in the criminal law for prevention. Prevention is, and has always been, consubstantial with the state's quest for security.⁵⁰ Presently, it is widely accepted that there is no sense in punishment that has no utilitarian purpose (at least to some extent). However, this is not at odds with the equally incontrovertible fact that, under the criminal law of a democratic state governed by the rule of law, such a preventive function cannot operate without restriction and without obeying a set of basic requirements that—in terms of the point in issue here—are represented principally by the notions of harmfulness and proportionality. All of this may perhaps seem obvious or old hat; though, it is precisely a case of asserting the relevance of *classical* criminal law principles in the face of a legislative reality that displays (sometimes, overtly and other times, more covertly) a pronounced tendency towards prevention that goes beyond the boundaries that have been designated not to be exceeded.

In relation to the specific issue examined by this paper, it is my view that consistency with the premises outlined above requires us to reject theories that justify punishing acts before the consummation of an offence on grounds related to the mere externalisation of criminal intent (subjective theses).⁵¹ The latter approach departs from the guiding principle of (sufficient) harmfulness set out above. Arguably, the adoption of this stance inevitably leads to an actor-based criminal law that punishes dangerous (or sometimes not even dangerous) perpetrators rather than specific dangerous acts. Legitimacy for the criminalisation of preparatory acts must thus be founded primarily on objective criteria⁵² and more

specifically, by reference to the danger they pose to legally protected interests (in terms of increasing the likelihood that the principal offence will be committed). Further, it should be noted that if we apply the principles of harm and proportionality, we cannot simply criminalise *any* danger (however remote) that arises from an external event nor can we criminalise dangers that are merely presumed, no matter how serious is the principal offence involved. Despite being patently ‘obvious’, this is something that is often forgotten by legislators. Indeed, to my mind, it has also been overlooked by those authors who maintain that there are no limits to the principle of the protection of the legally protected interest and thus no restrictions on anticipating the commencement of the danger to that interest.⁵³ If that principle is understood in an intrinsically democratic sense—as I believe it should be—it is thus subordinate to the notion of the maximisation of freedom. And it is also necessarily connected to the requirements of harmfulness and proportionality with the consequent limits on what can be punished (as discussed above).⁵⁴ The logical consequence of all of this is that the criminalisation of preparatory acts must necessarily be very restricted in scope (and genuinely so).

I shall close by briefly outlining some measures that could be adopted to achieve this objective in the future regulation of this issue. First, any legal definitions of ‘preparatory acts’ should be cut back considerably; for example, any act of incitement should be direct (thus a successive chain of incitements would not be punishable) and the justification or glorification of a crime or its perpetrator should be ruled out as a form of public provocation. The scope of the target offences of the preparatory acts should also be reduced substantially, restricting them to offences involving wilful and unconsented harm to a person’s life and also, at most, to serious attacks on a person’s health. This requirement would imply the disappearance of many of the preparatory behaviours defined as offences under the special parts of the criminal codes (or preparatory offences). This should occur even where the preparatory conduct relates to a serious target offence (i.e., one that affects life or health) in those situations where the punishment is for preparing to prepare or for other very preliminary stages of the *iter criminis* and in other situations in which, based on the considerations set out above, it can be concluded that what is being punished is the dangerousness of the perpetrator. Finally, in what is surely the most urgent task of all, the penalties must be reduced so that in all cases they are considerably lower than those for the completed offence and the attempted offence. In short, it is necessary to move in precisely the opposite direction from the course which, as we have seen, is currently being adopted by legislative trends in Spain, and in other nearby states and within the EU.

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¹ In Spain, using a well-known expression, Jiménez de Asúa (1954: 502) likens the restrictive criminalisation of conspiracy to a ‘thermometer’ that measures ‘the heat of the liberal convictions’ of criminal codes.

² Cf., for example, Fletcher 1998: 171–172; Jakobs 1985: 751–785.

³ Vives Antón 1996: 104.

⁴ Rodríguez Mourullo 1980: 6.

⁵ As is widely acknowledged, these trends have given rise to various paradigms and analytical models for examining the current legislation that share much common ground. For example, there have been extensive discussions on enemy criminal law (Jakobs 1985; 2006), the culture of control (Garland 2001), the return to incapacitation (Silva Sánchez 2002), the phenomenon of overcriminalisation (Luna 2005; Husak 2008), citizen security criminal law (Díez Ripollés 2005) and preventive justice (Ashworth and Zedner 2014).

⁶ Such as homicide and murder (Article 141 of the SCC), assault (Article 151 of the SCC), unlawful detention (Article 168 of the SCC), various property crimes (Articles 269 and 304 of the SCC), drug trafficking (Article 373 of the SCC), offences against the public administration (Article 445 of the SCC), attacks on public authorities (Article 553 of the SCC), terrorism (Article 579.3 of the SCC) and offences against the international community (Article 615 of the SCC).

- ⁷ See, for example, Alastuey Dobón, 2016: 186-188; Mir Puig 2016: 346.
- ⁸ See Campo Moreno 2000: 19; Gil Gil et al. 2017: 240-241, among others.
- ⁹ Organic Law 1/2015, reforming the SCC, not only significantly increased the number of preparatory conduct in different areas of crime where these kinds of (preparatory) offences already existed (e.g., terrorism, sexual freedom, intellectual and industrial property and forgery), but also incorporated new ones in other fields, such as damages to computers (Article 264 ter of the SCC), privacy offences (Article 197 ter of the SCC), public order offences (Articles 557.2 y 559 of the SCC) and incitement to hate and discrimination (Articles 510.1.[b] y 510.2.[a] of the SCC).
- ¹⁰ For example, those related to the offence of online child grooming (Council of Europe Convention of 25 October 2007 and Proposal for a Directive on combating sexual abuse, sexual exploitation of children and child pornography of 29 of March 2010) or the creation or provision of the means of committing privacy offences (Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013). Notably, in the area of terrorism (Council Framework Decision 2008/919/JHA of 28 November 2008 and Directive (EU) 2017/541), the Spanish legislator has repeatedly made use of the international commitments adopted (especially the abovementioned Framework Decision 2008/919/JHA and United Nations Security Council Resolution 2178/2014) as a pretext for going even further than necessary.
- ¹¹ Arguably, the punished behaviour in this case represents a purely mediate danger, as it is not in itself capable of damaging the legally protected interest but always requires a subsequent act (whether by the perpetrator him or herself or by a third party). See, for example, Fuentes Osorio 2007: 63-65. Simester and Von Hirsch (2011: 79) refer to offences with this characteristic, such as preparatory or possession offences, as 'prophylactic crimes' while Duff (2005: 963-965) uses the term 'indirect danger'.
- ¹² The terms in which the first judicial ruling on this offence (introduced into the SCC in 2015) is expressed provides a good illustration of this risk: 'The 14 documents found in the phone memory [belonging to the accused] are complementary and are clear proof that [the accused] had adopted jihadist beliefs. They are proof that he had adopted the tenets of violence and of a heroic fight to the death as the means of achieving victory over the infidels. The indoctrination is complete ...' (judgment of the Spanish National High Court of 30 November 2016 (No 39/2016)). This judgment was quashed by the judgment of the Spanish Supreme Court of 17 May 2017 (No 354/2017) in which the defendant was found to be not guilty of the offence in view of a lack of evidence in this specific case that the accused intended to equip himself to commit an offence of terrorism. Shortly thereafter, the Spanish Supreme Court, in a judgment of 10 October 2017 (No 661/2017), sentenced an individual for the same offence whose mobile phone contained videos and photographs aimed at encouraging individuals to join DAESH-Islamic State on the basis that it had been proven 'that in the course of telephone conversations with his family the accused had agreed to go to Syria to fill the place left by (his brother) when he died in the suicide act for which he was 'destined' and that 'in none of the conversations did the accused give his brother specific dates for travelling to Syria, but he did indicate his assent to waging jihad when an opportunity arose, putting off his decision until a later date'.
- ¹³ Ruling of the Spanish Supreme Court of 17 May 2017 (No 354/2017).
- ¹⁴ See endnote 12. Cf. also Cuerda Arnau and Fernández Hernández 2019: 113-116.
- ¹⁵ For a critical evaluation, see Alonso Rimo 2010: 13-80.
- ¹⁶ For criticisms on this line of case law, see Mira Benavent 2016: 110-111. Recently, *some* legal rulings have adopted a more restricted and reasonable interpretation of this offence, which rests in part on the judgment of the Spanish Constitutional Court of 20 June 2016 (No 112/2016) and also on Directive (EU) 2017/541 on combating terrorism. See, in particular, the rulings of the Spanish Supreme Court of 17 May 2017 (No 354/2017), 25 May 2017 (No 378/2017) and 25 February 2018 (No 95/2018).
- ¹⁷ For further details, see Alonso Rimo 2016: 86, 107, footnotes 104, 140.
- ¹⁸ Zedner (2014: 114) rightly criticises the fact that such a definition of *actus reus* (i.e., 'any conduct') places exceptional weight on the preparatory intent of the perpetrator, paving the way for interpreting the offence as a thought crime.
- ¹⁹ A clear lack of specificity also characterises the various preparatory offences in the German Act for the Prosecution of Preparation of Serious Violent Offences endangering State of 2009. On this point, see Sieber 2012: 269-270, 276, 278.
- ²⁰ American Law Institute 1985: 294.
- ²¹ American Law Institute 1985: 295.
- ²² The only exception to this general rule is that of inchoate offences connected to extremely serious crimes (s 5.05 of the MPC).
- ²³ American Law Institute 1985: 490. Robinson and Dubber (2007: 329, 336) have criticised the alignment of the penalties as 'both the most doctrinaire and the least successful decision by the code drafters'.
- ²⁴ Cf. Loewy 2009: 238, citing the views of other authors.
- ²⁵ Cf. also Husak 2011: 1187, 1203, who cites attempt, conspiracy and solicitation as generally accepted paradigmatic examples of the type of case in which punishment is justified in terms of future harm rather than harm that has already occurred. From a broader perspective, on the rationale for criminal responsibility in English criminal law based on the character, see Lacey 2016: 33-41, with further references; see also pp. 57 ff., 99 ff., 135 ff. in which it was concluded that significant recent developments in (English) criminal law and procedure make it possible to talk to some extent of a 'resurgence of character' as an organizing principle of responsibility-attribution (p. 172).
- ²⁶ On the concept of actor-based criminal law, see, Jescheck and Weigend 1996: 54-55; Gómez Martín 2007.
- ²⁷ Vasalli (1987: 35) notes that this term, which is widely used in Italian legal scholarship, is formally sanctioned by the SCC itself (specifically, Articles 202.2 and 229.2, which explicitly provide for security measures to be applied to an 'act not classified in law as an offence').
- ²⁸ See Martufi 2015: 818-850.
- ²⁹ Dick (1956). Pawlik (2008: 43) talks of 'anticipated security custody' (*vorweggenommenen Sicherungsverwahrung*) with reference to the *de facto* function in German criminal law of the offence of membership of a terrorist organisation (section 129a GCC) and preparation of a serious violent crime against state security (section 89 GCC). For their part, Husak (2011:

- 1187 ff.) and Robinson (2008: 87–106), while maintaining different criteria with regard to their validity, condemn the existence of a large number of provisions in the US' legal system, including the traditional inchoate offences and other preparatory offences, which hide preventive detention behind the mask of deserved punishment.
- ³⁰ See Husak (2011: 1173–1204) for whom preventive detention can be defended as a justified punishment within the overall framework of criminal law, albeit one that should be subject to certain constraints.
- ³¹ See, Jakobs 2006: 846–851, Silva Sánchez 2011: 183–188 and Pawlik 2008: 25–37, respectively, who believe that in exceptional contexts and in respect of certain criminal phenomena, it is legitimate to push the reach of punitive intervention to extremes to neutralise the dangerousness of the perpetrator in conjunction with tough penalties (e.g., gaol). In short, and as is generally explicitly recognised, this means abandoning the perspective of the past event in favour of the perspective of the future event.
- ³² This is the argument put forward by Robinson 2008: 104–106, among others.
- ³³ See Robinson 2008: 91.
- ³⁴ In an approach consistent with the new actuarial model. See Harcourt 2007.
- ³⁵ On this point, see Martínez Garay 2014: 1–67.
- ³⁶ However, it should be noted that these authors are addressing in particular the offences of possession and membership.
- ³⁷ Cf. Mira Benavent (2016: 110), who refers to an 'unprecedented rise' in this offence. Similarly, Cuerda Arnau and Fernández Hernández (2019: 115) refer to compelling data on percentages of application (of the offence) and Miró Llinares (2017: 35–36) and Cancio Meliá and Díaz Lopez (2019: 168–179) make extensive references to the broad range of cases to which this offence has been applied in recent years.
- ³⁸ Ashworth 2011: 126–127, 141.
- ³⁹ See Ashworth and Zedner 2014: 98–99.
- ⁴⁰ In the US, under the MPC, the system of punishment for inchoate offences (in this case, attempt, conspiracy and solicitation) is also non-exclusive. Such offences are punishable in respect of the entire set of crimes. Further, as noted above, the penalties for the inchoate offences are generally the same as for the main offences that are their object (section 5.05[1]).
- ⁴¹ See Ashworth and Zedner 2014: 74 ss, 144 ss.
- ⁴² In relation to the increasingly preventive nature of common law legal systems, in addition to the work by Ashworth and Zedner cited above, see Ramsay 2012 and Carvalho 2017.
- ⁴³ A judgment of the Spanish Constitutional Court of 4 July 1991 (No. 150/1991). By way of an example, it is also worth mentioning the assessment by Jescheck and Weigend (1996: 54) concerning the German system under which the current criminal law is act-based criminal law. Similarly, Roxin (2006: 179, 185) notes that a legal system based on the principles of a liberal state governed by the rule of law will always tend towards act-based criminal law and that there is no question that current (German) criminal law is predominantly act-based.
- ⁴⁴ Proof of this is case law's mainly flexible interpretation of offences, such as self-indoctrination and glorifying terrorism, as previously emphasised. For a critique of the Spanish courts' expansive application of the offences of membership of and aiding terrorist organisations, see Gil Gil 2014.
- ⁴⁵ In relation to the concept of enemy criminal law, see Jakobs 2006. See also Cancio Meliá 2006: 137–139, who highlights the close structural link between actor-based criminal law and enemy criminal law.
- ⁴⁶ In a similar vein, see also, among others, Puschke 2010: 14.
- ⁴⁷ Ambos 2019; Portilla Contreras 2009.
- ⁴⁸ In addition to the references cited above, see generally, Act for the Prosecution of Preparation of Serious Violent Offences endangering State, passed in 2009 and amended in 2015. In relation to the proliferation of preparatory offences in German criminal law, see Petzsche 2013: 67–76.
- ⁴⁹ Two illustrative examples include the previously mentioned EU Directive 2017/541 on combating terrorism and EU Directive 2019/713 on combating fraud and the counterfeiting of non-cash means of payment both of which provide for a significant number of preparatory offences (see, respectively, Articles 4 to 11, and Articles 4c and d, 5c and d, and 7).
- ⁵⁰ See Zedner 2019: 61–64.
- ⁵¹ Cf. Roxin 2003: 342–343, noting that this is the theory defended by German jurisprudence and that a significant part of German scholarship also follows (in respect of attempt). For a discussion of the rationale for inchoate offences, and in particular for attempted offences, in the Anglo-American sphere, where different reasons are invoked, including consequentialist and retributive justifications and grounds linked to the dangerousness of the offender, see Ashworth 2011: 129–131.
- ⁵² In principle, this is the predominant theory in Spain; however, the reality is that Spanish scholars have thus far failed to put up much of a fight against the progressive expansion in the punishment of preparatory conduct, even though a broad criminalisation of preparatory acts is generally a sign that punishment is actually founded on subjective criteria (given that all that a subjective approach requires to justify punishment is the externalisation of an intent to commit a crime, which is always present in preparatory acts).
- ⁵³ See, for all, Jakobs 1985: 753.
- ⁵⁴ For a criticism of Jakobs's approach to this issue (1985: 751–785), see Alonso Rimo (forthcoming 2020), where I also point out that Jakobs's acceptance of the legitimacy of what he terms 'flanking rules' (*flankierende Normen*) eventually leads him to outcomes that point in the opposite direction to his declared aims to restrict the scope of criminalisation 'in the previous state' and afford greater protection to the private sphere of the individual than is possible if one starts from the principle of the protection of the legally protected interest.

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