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### **Towards Equalisation of the Impact of the Penal Fine: Why the Wealth of the Offender Was Taken into Account**

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#### **Abstract**

Important changes in the legal regulation of the fine culminated in the implementation of the day-fine system in many European countries during the twentieth century. These changes resulted from various late nineteenth century rationalities that considered the fine a justifiable punishment. Therefore, they supported extending its application by making it affordable for people on low incomes, which meant imprisonment for fine default could mostly be avoided without undermining the end of punishment. In this paper I investigate the historical development of the penal fine as well as the changing forms of this penalty in Western European criminal systems from the end of the eighteenth century until the late nineteenth century.

#### **Keywords**

Fine, short-term imprisonment, fine default, equality principle, liberalism.

#### **Introduction**

One of the considerations of a legal nature with greater influence on the courts' attitude towards penal fines is the changeable legal regulation in order to make them affordable for persons on low incomes. In fact, the implementation of the day-fine system in many European countries was the effect of various late nineteenth century rationalities that considered the fine a justifiable punishment. Therefore, these rationalities tried to support its extension by making it affordable, which meant that offenders could mostly avoid imprisonment for fine default. This paper investigates the historical development of the penal fine and factors that have influenced the changing forms of this penalty in Western European criminal systems<sup>1</sup> from the end of the eighteenth century until the late nineteenth century. Understanding change or innovation in penal law should involve a historically informed appreciation of the situation and of the often conflicting pressures which confront scholars, thinkers and policy-makers. Accordingly, I explain why the problem of achieving equality of punishment impact between offenders arose. Additionally, I investigate how criticism of the disastrous effects of short-term imprisonment advanced the day-fine as a way to overcome the perceived inequality of monetary punishments.

### **The liberal approach to fines**

The fine was a very important sanction in most European countries until the late eighteenth century (see for England, Briggs et al. 1996 and Sharpe 1990: 20-25; for Germany, Neumaier 1947; for Spain, Roldán Barbero 1988: 176; for Italy, Cecchini 1991: 282 ff). As O'Malley (2009: 70) explains, '... [i]t was not simply corporal punishment that prisons displaced, but also and even more so, fines'.

The use of fines as a punishment, however, was almost abandoned. This shift away from the fine occurred, firstly, because the penalty of imprisonment was regarded as a more equal punishment than the fine due to the way, from the end of the eighteenth century, that liberty was regarded. Liberty was something that, in the main, every person should possess in the same amount. Under the banner of equality under the law, which meant eliminating any formal discrimination in the way sanctions were handed out, legislative parity was centred on the value of 'freedom'. Equality issues associated with using imprisonment for punishment did not stem from dissention about rights to liberty in which all individuals were presumed equal. Rather, concerns about equality were in response to the examination of incarceration rates which revealed that the probability of imprisonment was linked to an individual's social class, race and income level.

The original attitude towards fines was very different. In fact, it was the reverse of that which was presumed for the use of imprisonment (Young 1989: 63). Nobody presumes that individuals are in equal positions as regards to money. Tariff and fixed-fine systems were adopted by the first criminal codes as a way of limiting the arbitrariness in the assessment of fines. They were based upon understandings that the same or similar amounts of money should be imposed on all defendants coming before the court convicted of a particular offence. But the result of such fines was, eventually, the lack of deterrence for the richer offenders<sup>2</sup> and the insolvency of the less affluent ones. Soon it was observed that punishing an offence with the imposition of a fine for a specific amount generally led to the legal imposition of inequality (in Italy, Filangieri 1788: Book III, second part, Chapter XXXII; in Germany, von Feuerbach 1804: 228; in Spain, Marcos Gutiérrez 1826 III: 145-147), unless the quantum of the fine was left to the discretion of the judges, which was considered 'seemingly repugnant to the genius of a government, formed and supported on maxims of freedom' (Eden 1771: 68). Fines did not sit well with the formal understanding of the principle of equality. In fact, for a large part of the literature of the early- and mid-nineteenth century, it seemed quite obvious that the fine could not be considered a 'fair' punishment at all:

The fine is a punishment of a singular kind, and has little in common with most other punishments established by law. While these cases encumber the person or freedom, which is almost the same person, those affect wealth only, which is something very different. The level of personality is the same for all men, and freedom is similar: wealth is so varied, men's fortunes are so disparate and diverse ... Therefore, if a personal punishment, death, custodial sentence, imprisonment, affects all men to an equal or similar extent, a pecuniary punishment is the most unequal that can be conceived, when it is applied in identical measures to two persons of different wealth. (Pacheco 1856: 414-415)

Admittedly, some scholars argued that the law was equal for all when the same amount of money was set to be paid, regardless of the offender's class or socio-economic status (Carrara 1871). But even from a formal perspective this argument could not be upheld. Imprisonment, it was argued, could be applied with more equal force than fines to those with means and those without. Moreover, it could be done without directly affecting the offender's family, unlike fines. Therefore, fine supporters usually limited its use to less severe crimes, petty offences and

misdemeanours (Bertola 1893: 553; Schmölder 1902: 11; Silvela 1903: 318; Vila Miquel 1917: 163). Additionally, fines were viewed as an inappropriate punishment when the crime was committed out of necessity, because then they would have criminogenic effects (Carrara 1871: 463; Ferri 1900: 454; Rauh 1912). This observation had already been put forth by Enlightenment thinkers like Beccaria (1764) or Kleinschrod (1794). Therefore, they proposed to avoid the use of fines, given the poverty of those who committed most property crimes, particularly theft.

A second explanation of the relegation of the fine to a comparatively minor role in the criminal justice system was the problem of imprisonment for fine defaulters. If the fine could not be effectively applied because of the offenders' insolvency, this automatically led to imprisonment as its substitution.<sup>3</sup> The need to emphatically reinforce the obligation to pay a fine very quickly led to prison sentences being handed down as a substitute sanction for cases of non-payment. Prisons were being filled with people who had originally been sentenced to pay a fine precisely because they were not considered to deserve imprisonment. This was a commonly recognised effect in the second half of the nineteenth century, and was still an issue in the first third of the twentieth century (Conti 1910: 457; Stooß 1907: 243; Thoday 1934: 30). This problem of imprisonment in default of payment became a central issue in criminal justice. During the late nineteenth-century crusade against short-term imprisonment, the deprivation of freedom for non-payment of fines, usually a short-term sentence, began to be rejected as counterproductive.

There was some experimentation with ways to manage the problem. A significant attempt was made to limit imprisonment for fine default to cases where the offender did not pay the fine 'wilfully, through laziness, licentiousness, or negligence' (Swiss Project for a Penal Code 1918, art. 46). This proposal, despite being supported by many socio-legal scholars (Florian 1934: 807; Garofalo 1887: 105, Stooß 1907: 245), was not embodied in legislation or failed to reduce imprisonment,<sup>4</sup> as its inevitable consequence was the impossibility of imposing fines on those who were unable to pay.<sup>5</sup> This, in turn, was thought to lead to recidivism (Heüman 1938: 549 ff.). To avoid the poor becoming unpunishable, a compromise was reached which established strict sentencing limits in order to restrict imprisonment time for non-payment.<sup>6</sup> The justification for this regulation was that, if no time limit was set, 'the punishment would be very disproportionate to the offence', and it was advisable to establish imprisonment for fine default 'within certain limits based on fairness that had been neglected' (de Vizmanos and Álvarez Martínez 1848: 270). But what was the extent of this disproportion if the conversion rate between money and time was considered suitable? There was no clear explanation but evidently it was linked to two aspects. First, those who were clearly unable to pay because of their lack of means should not be treated in the same way as those who fraudulently refused to pay. And second, a prison sentence becomes harder the longer it goes on, while the intensity of a fine penalty does not always increase with a larger amount, depending on the financial situation of the offender. Depriving the offender of an amount he or she needed to live was not the same as depriving him or her of something that was superfluous to cover the most basic needs (see in this regard Rossi 1853: 495-496).

The length of the prison sentence was also limited in the case of small fines. For example, in England, for fines of not more than five shillings, it was recommended that imprisonment should be prohibited and detention for not more than twenty-four hours in police stations cells substituted (Thoday 1934: 32).

Additionally, in some countries it was considered inappropriate to impose imprisonment for fine default on prisoners who were already sentenced to long-term custodial sentences (for instance, at least four years or more in the Spanish Penal Code 1848, art. 49).

The limited effect of the measures mentioned above led to the correctionalists' criticism against short-term prison sentences being broadened, towards the end of the nineteenth century, to include fines.<sup>7</sup> This negative point of view made it necessary to propose either abolishing the fine or making significant amendments to its regulations. The key idea was that calculating the fine according to the offender's financial situation would no longer make it necessary to impose prison sentences for non-payment. Hence, this determination of the fine was explicitly geared to reducing the problem of overcrowded prisons and unnecessary short-term imprisonment but, as we will see, it was also justified by arguments based on equalising the impact of fines (Glauning 1905; Goldschmidt 1908: 408-409; Stooß 1907; von Liszt 1889a: 45). A new concept of equality, different from the one accepted during the Enlightenment, had to be taken into account.

### **Taking into account the wealth of the offender**

Legislation of the *ancien régime* admitted the clause of determining the amount of the fine based on the greater or lesser wealth of the offender,<sup>8</sup> and the same approach can be seen in some of the first European criminal codes.<sup>9</sup> In *The Rationale of Punishment*, Bentham (1811) had already pointed to the possibility of the amount of the fine taking into account 'the fortune of the offender' as well as the profit of the offence, the value of the thing which is the subject matter of the offence, and the amount of the injury. Specifically, he stated that, in order to guarantee equality of impact, the most appropriate way of proceeding was to establish a percentage of the offender's wealth (1811: Chapter IV, Section II.3). His was a minority viewpoint in continental Europe, where two arguments supported the fact that the offender's financial situation was *not* to be taken into account when fixing the amount of the fine.

The first argument, the establishment of fixed penalties that did not leave courts much latitude, was aimed at combatting the arbitrariness of the *ancien régime*. It was the clear wish that the fine did not become a type of general confiscation of the offender's assets, a measure that had been abused during the *ancien régime* and which, after the Enlightened criticisms (Beccaria 1764: Chapter XXV; Voltaire's *Commentaries*: Chapter 21; von Feuerbach 1804: 163-164) was forbidden in the first Constitutions.<sup>10</sup> The need to break away from the *ancien régime* also bore some relation with the wish to prevent the courts from having to investigate thoroughly to determine what the offender possessed, as this procedure had inquisitorial overtones (Auriolles Montero 1849: 95-96; Rossi 1853: 496).

Secondly, the principle of equality, stated in the first Constitutions, was understood to be a formal equality in terms of rights and obligations and in rewards and punishments, which prevented or advised against establishing differences based on the wealth of offenders.<sup>11</sup> This reaction was understandable given that the fine had been used as a privilege of the rich during the previous centuries. But what was considered at the time to be a manifestation of the principle of equality – that punishments were imposed on everyone to the same extent – appeared at the end of the nineteenth century as a manifestation of inequality.<sup>12</sup> It was reasoned that equality can pull in two directions: on the one hand, towards the achievement of formal equality related to the seriousness of the crime; and, on the other hand, towards material equality related to the offender's level of income. As we will see, one followed the other during the transition into the twentieth century.

In practice, this viewpoint led to the belief that it was unfair to determine the amount of the fine based on the financial capacity of the offender, because the amount set for the fine would not be proportionate to the seriousness of the offence but rather would depend on external circumstances (Carrara 1871: 464-465). From the perspective of the internal structure of the theory of crime and punishment, Germany's Merkel (1893: 351) and Berolzheimer (1907: 255) saw no sense in taking the offender's financial circumstances into account when determining

the punishment as these bore no relation whatsoever to the level of culpability. They argued that the solvent offender was richer, not guiltier, and what should, in general, be considered positively must not be turned into a disadvantage in the penal domain. Arguments were lodged against this objection stating that, when determining the punishment, the level of culpability should be considered as well as the type of punishment that should be imposed. The key idea was that culpability, as an element of the crime related to retribution, cannot be considered in a purely objective manner and limited to the criminal act, but rather its subjective aspect must be taken into account in the sense that the suffering inflicted must be truly felt by the offender. Therefore, the attention paid to the offender's financial capacity was not incompatible with the basis used for determining the punishment (Goldschmidt 1908: 402-403; Rauh 1912: 32; Thyrén 1910: 74). And there was no shortage of defenders of the idea that the rich man who committed a crime was, in fact, guiltier, because he has greater means and abilities to uphold the law than the person who does it while deprived of resources (Bonneville de Marsangy 1864: 289; Vila Miquel 1917: 143).

In spite of these negative opinions, the problem of imprisonment for fine defaulters made it necessary to propose either abolishing the fine or introducing significant innovations to deal with the problem of defaulters (Seagle 1948: 250-252).

### **The problem of determining the offender's economic situation**

The progressive confluence of opinions regarding the need to take the offender's financial situation into account did not spread to other relevant aspects of the fine, such as the concepts that had to be considered when determining the offender's financial capacity. For example, in most common-law countries, there was a rather casual approach to performing the calculations, 'usually involving no more than a probation officer's or a social worker's report and thus not significantly slowing the administrative pace of the summary justice machine' (O'Malley 2009: 53). But in continental Europe discussions arose about whether income or assets should be taken into account when determining the fine. The viewpoint of the growing industrial and commercial bourgeoisie, concerned about holding on to their wealth, was that the fine should be determined in accordance with income, as a guarantee against the confiscation of assets (Aurioles Montero 1849: 96; de Vizmanos and Álvarez Martínez 1848: 306-307; Goldschmidt 1908: 403; Rossi 1853: 274-275; Wahlberg 1875: 262). The spread of salaried work also tipped the balance in favour of income, which was relevant to a growing number of people, instead of assets, which only concerned a fairly small sector of the population, as highlighted by von Lilienthal (1892: 80) who considered assets as a subsidiary criterion.

But it was one thing to say that the fine should be in line with the offender's income and another thing to determine what this income was. The concern for avoiding state intrusion into citizens' financial affairs led to the proposal that only known, manifest or officially certified income (Lammasch 1891: 232; Wahlberg 1872: 136), the annually paid income tax (Goldschmidt 1908: 402; Rosenfeld 1892: 187; Runkel-Langsdorff 1908: 43; von Liszt 1889a: 45), or census data, which listed the people obliged to pay tax (Mittelstädt 1891: 63), should be taken into account. In countries with a less developed tax system, such as Spain, it was proposed that disposable income would be certified by the mayor and four dignitaries (Vila Miquel 1917: 146). All this was aimed at avoiding enquiries into 'family secrets', or adding 'upheaval or indignity to the fine' (de Vizmanos and Álvarez Martínez 1848: 307; also see Rossi 1853: 496), based on the fact that:

... [o]ur ideas do not allow for an inquisition into the possessions of each individual. The courts, on the other hand, would attempt this in vain. This cannot, and must not, happen. (Pacheco 1856: 415)

Other proposals focussing on establishing the fine based on the income declared by the offender did not prosper. They tried to incorporate concepts which had been designed primarily for those who had money and would most likely be affected by tax law, with other ideas which considered in particular people belonging to the poorer classes who were more likely to be subjected to criminal law alone (Roldán Barbero 1983: 31). Taxes were not comparable to fines, although the sums of both were received by the State. As von Buri (1878: 242) said:

... the exclusive essence of the fine is that the offender experiences, through its enforcement, a reduction of his wealth, that makes him poorer than he was previously. That a third party, especially the State, should accrete an asset upon payment of the fine is, in contrast, merely secondary. The money received from the offender could be appropriated, destroyed or thrown away, and the essence of the fine would still be intact.

However, beyond these differences, in proposals to base the amount of the fine on taxes, the need to rationalise the calculation system and make it more predictable was a cause of concern for some. This was opposed by those who believed that it was not the remit of criminal law to undertake financial investigations (for example, Stooß 1907: 243).

The initial proposals regarding the proportion of the offender's income were quite demanding. For example, Garofalo (1887: 106-108) understood that, when dealing with solvent offenders, it was appropriate to take the proportion of their income that exceeded what was absolutely essential to cover their basic living needs for board and lodging. These needs were calculated as what was strictly necessary to avoid starving, without the slightest consideration given to their social status and their accustomed lifestyle. However, opinions were soon expressed regarding the need to consider not only family duties but also the difference between what was superfluous and what was necessary, because 'a quarter of the daily income of a well-to-do gentleman is not the same proportion, although it may seem to be, as a quarter of the daily income of a manual worker' (de Vizmanos and Álvarez Martínez 1848: 307, quoting Bentham to support this view). This concern, widespread in European literature,<sup>13</sup> foreshadowed the establishment of the fine as a penalty that deprived offenders of income that was not strictly necessary for their personal maintenance and family duties; in other words, a penalty that deprived them of the *excess* that they could otherwise spend on consumption or leisure (as formulated by Bauman 1968: 71).

The difficulties inherent in determining the financial situation of the offender led to some penal codes initially adopting detailed formulas. These were gradually simplified until they were merely programmatic declarations, and without actually having determined how they should be specified in judicial practice. Others experienced oscillating progress regarding this issue. The fact is that, in the judicial practice of the European countries considered here, the general tendency was not to make too many enquiries into the offender's level of income, essentially relying solely on information from the defendant and his or her counsel. The high degree of confidence given to this self-reported information from average offenders was mostly supported by scarce verification efforts. It would have been possible, however, for the courts to have a great deal more information and without major structural reforms, if they had asked for it. They did not, however, mostly because they lacked the time to do so. Nevertheless, courts were less confident about the accuracy of reports received from higher-income offenders, in which case they tended to use what they knew about the offender, including information about his or her residence, occupation, number of children, and so on. This method of proceeding still goes on today, despite the enormous possibilities of crosschecking data offered by computer systems.

No solution was found for the cases of people with no income. In these situations, only working in prison or in public works was considered acceptable, with a minority asking for the remission of the penalty (Stooß 1907: 246).

### **The route towards the day fine**

It should be noted that the need to consider the offender's financial situation to determine the end amount of the fine concurred with other factors that should also be taken into account. These included, in particular, the severity of the offence and the blameworthiness of the perpetrator. Only with the day-fine system did the offender's ability to pay the fine become the one and only aspect considered when setting the monetary value for the fine units – each unit was one 'day' – while the number of these units was selected according to the degree of punishment appropriate for the specific criminal behaviour. In essence, '... the basis of the day-fine system is the two-stage breakdown of the determination method' (Roldán Barbero 1983: 45).

In fact, the need to take the offender's financial situation into account does not, *per se*, define the day-fine system. Rather, it is one of the methods of the so-called fine total amount system ('*Gesamtsummensystem*'), where the judge imposes a specific amount, essentially the combination of two coordinates: the severity of the offence and the offender's financial situation (Beristain Ipiña 1976: 31). These two coordinates eventually became three with the blameworthiness of the perpetrator added once the imperative for justice to express the offender's level of culpability in the sentence was rationalised (Mittelbach 1957: 1139). But there was still a long way to go to establish the day-fine system.

The first doctrinal formulations of the day-fine system, defined in terms of the need to break the determination process of the fine down into two elements, are found at the end of the nineteenth century, almost simultaneously in Germany (Friedmann 1892: 148, followed by Merkel 1893: 351 ff.) and Italy (Bertola 1895: 10, 12).<sup>14</sup> They shared the idea of adopting a term of imprisonment as the basic measure of the fine; in other words, as a means of determining the duration of the penalty. Then, using a conversion method based on the offender's financial situation, each day of the penalty could be replaced with a specific amount of money. These proposals, although based on a term of imprisonment – which, to a certain extent, blurred the autonomy of the fine penalty (Grebing 1978: 75) – should, nevertheless, be considered as the first doctrinal formulations of the day-fine system (Driendl 1978: 19, 39; Roldán Barbero 1983: 44-45). In fact, they occurred several years prior to the proposal made by the Swedish Thyrén (1910), who many mistakenly took to be the creator of this system (see, for example, Florian 1934: 807; Hillsman et al. 1984: 16). The day-fine system was, however, first introduced in Finland in 1921, then in Sweden in 1931, followed by Denmark in 1939, which is why it is known today as the 'Scandinavian system'. From there it spread to other European countries (Austria, France, Germany, Greece, Portugal, Spain, and so on).

In the modern day-fine system, the amount of the fine is established in two stages. The first involves setting the number of sentencing days to be imposed, taking into account the seriousness of the offence and without regard for the offender's financial situation. In the second stage, the monetary value to be paid for each day of sentencing is set in light of the financial circumstances. The question of how to translate day-fines into prison terms in case of fine default is answered in a very efficient way that avoids the creation of differences between diverse income groups, as feared by Mittelbach (1957: 1139): one, two, or three temporal units of the fine converts to one day in prison. In this way, there are no differences in the penalty between income groups of offenders because the number of days in the day-fine system is fixed according to the seriousness of crime. In other words, the penalty would be the same for a poor and a rich offender convicted of the same crime. Thus, the system does not offend the principle

of proportionality between crime and punishment, or the principle of equality between rich and poor offenders. By using the day-fine system, the fine obtained is proportionate to the offence with this proportion expressed in temporal units – days or months – and reflective of the offender’s means with this reflection expressed in monetary terms with a certain sum to be paid for each day.

## Conclusion

In summary, from the end of the eighteenth century and throughout the nineteenth century, we saw the infiltration of a key idea which directed the development process of the fine. This was that the amount of the fine must be calculated so that it leaves the offender the necessary means of support<sup>15</sup> but ‘excluding the amount that serves to satisfy pleasures, whatever these may be, such as wine, spirits and tobacco’ (Garofalo 1887: 108; see Vila Miquel 1917: 150, 161). Then, in the second half of the twentieth century, discussions arose about whether it was a matter of depriving the offender of the whole amount that was not strictly necessary to cover the essentials, as proposed by Bauman (1968: 71) and Zipf (1974: 513 ff.). Subsequently, the amount of an offender’s daily wage was proposed as the maximum fine. In some penal codes, this amount was the officially recognised minimum wage but this was not necessarily a measure of the offender’s income. But that is another story to be told at another time.

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<sup>1</sup> References used are not only in English, but predominantly in German, Italian, and Spanish. My purpose is to make the huge ‘non-English-speaking’ literature about the penal fine known to the Anglophone academic world, where the small amount of attention sociologists of punishment and social control, legal scholars, and criminologists give to the role of money and fines in the criminal system is extremely surprising (as indicated by Bottoms 1983: 168; Young 1989: 47; O’Malley 2009). In contrast, the quantity and quality of works relating to the penal fine in Germany is amazing. They also cover the entire codification period to the present, and the perspective taken is, in many cases, historical. This intense attention devoted to the fine was well known in the countries of its area of influence: not only in German-speaking countries as one would expect (Austria and Switzerland) but also those that received a strong influence of German law at various times in their academic history: basically Spain and Italy. However, I will make no attempt to systematically compare these countries. They shared much with, but also differed greatly from, each other. I will refer to their experiences and developments only when sources allow and as appropriate for the advancement of my argument.

<sup>2</sup> Soon it was also clear that the same fine amount for all offenders sentenced for the same crime made the punitive impact of fine sentences comparatively less for more affluent offenders, since these systems tend to depress fine amounts to adapt them to the lowest common economic denominator of offenders in one determined country, a problem already identified by writers and thinkers across Europe (Filangieri 1788: Book III, second part, Chapter XXXII; Carrara 1871: 464; Gutmann 1909: 127-128).

<sup>3</sup> The numbers of people in prison for the non-payment of fines were very different from one country to other, but large by any standard. For example, in Spain it was argued that, in ninety per cent of sentences, the fine was misleading because the offender then proceeded to declare himself insolvent (Armengol Cornet 1894: 57). In Switzerland Stooß (1907: 243; 1916: 2-3) stated that there were more people in prison for the non-payment of fines than people who had originally received a custodial sentence, offering statistical data that confirmed this observation. In Italy it was well known that the pecuniary punishments were imposed only *pro forma* on the poor, since in reality they turned into prison sentences as the fines inevitably remained unpaid (Florian 1934: 807). In Germany von Liszt (1889b: 742) also stated that, in the majority of cases, the fine became a short-term prison sentence due to non-payment, despite the fact that there are no data on this matter in the imperial statistics. It was simply stated in 1884 that the fines that became prison sentences made up a ‘not insignificant’ percentage (*Kriminalstatistik* 1884: 14). According to a study concerning the situation of the Grand Duchy of Württemberg between the years 1888 and 1892, approximately 34 per cent of the fines handed out turned into prison sentences or were recorded as bad debts, 41 per cent were paid and 25 per cent were immediately substituted because of the offender’s insolvency (Rettich 1894: 507).



- <sup>4</sup> For example, the English Rating and Evaluation Act 1925, which provided that a defaulter who proved that his failure to pay was due to circumstances beyond his control should not be imprisoned, had no effect at all (Thoday 1937: 389).
- <sup>5</sup> As acknowledged in some of the first enlightened criminal codes. For example, the Prussian *Allgemeines Landrecht* 1794, § 85, which provided that ‘fines cannot be imposed on persons without means of the lower classes’, and that they should be replaced with a proportionate prison or labour sentence.
- <sup>6</sup> For example, two months for regulatory offences in the Tuscany Penal Code 1853 (which did not allow substitution for imprisonment in case of criminal offences); two years for criminal offences in the Spanish Penal Codes 1822 and 1848 and the Sardinian Penal Code 1859; four years in the Prussian Penal Code 1851; one year for crimes and six weeks for misdemeanours in the German Imperial Penal Code 1871; and four years of ‘reclusione’ or three of ‘arresto’ in the Italian Rocco Penal Code 1930.
- <sup>7</sup> For example, in Spain the authors, influenced by correctionalist approaches but also by the socio-economic reality, adopted viewpoints that were completely unfavourable towards pecuniary punishments (Vida 1885: 58, 68; Armengol Cornet 1894: 57; Bernaldo de Quirós 1898: 306; Bernaldo de Quirós and Navarro de Palencia 1911: 598) or, at the very most, they expressed resigned acceptance considering them the lesser of two evils compared to short-term prison sentences (Arenal 1890: 321), with some notable exceptions (Silvela 1874: 318). In Italy it was also emphasised that, given the situation affecting a large part of the population trapped in the most abject poverty, the fine was a penalty that should be abolished, since in reality it automatically turned into a prison sentence. This was a situation that Ciccarelli (1897: 655) described as an ‘iniquity’, nothing more than a ‘punishment of poverty’. The same view was upheld in Switzerland, where Stooß (1916: 5 ff.) spoke of the fine as a ‘privilege of the rich’; and also in Germany, where Merkel (1895: 387) pointed out that imprisonment for fine defaulters gave the administration of justice the nature of a justice of classes, since the rich man pays, while the poor one goes to prison.
- <sup>8</sup> For example, in Spain, Law I, title I, book XII of the *Fuero Juzgo*, a codex of Spanish laws enacted by Fernando III of Castile in 1241; and more recently, Law VIII, title 31, Partida VII of the *Siete Partidas* or Seven-Part Code 1348, a Castilian statutory code first compiled during the reign of Alfonso X of Castile.
- <sup>9</sup> For example, the Austrian Penal Codes 1803, § 23, and 1852, § 260, or the Penal Code for the Kingdom of Wurttemberg 1839, art. 32.
- <sup>10</sup> See the Austrian Criminal Code 1803; the Penal Law Code for the Kingdom of Bavaria 1813, art. 33; the Spanish Constitution 1812, art. 304; and the French *Charte Constitutionnelle* 1814, art. 66. In Italy it was suppressed by Carlo Alberto in 1831 – art. 5 of the *Regie patenti* 19 May 1831 – following the precedents of the penal codes of the Kingdom of the Two Sicilies 1819 and of the Kingdom of Parma 1820, in which it no longer appeared.
- <sup>11</sup> So, for example, in Spain, with regard to the general demand to not make distinctions when imposing penalties, Calatrava, one of the main writers of the Spanish Penal Code 1822, said during the pre-legislative discussions:  
 For me legal equality means that a Spaniard of any class, who commits an offence the same as one committed by another Spaniard of a different class, is subject to the same punishment ... This is the equality of the Constitution, and I believe that it is also in line with the principles of good legislation. (*Diario de las Sesiones de Cortes. Congreso*, legislature of 22 September 1821 to 14 February 1822, n° 60, 926)
- In Germany, in turn, there was also some resistance to measuring wealth in order to determine the amount of the fine, based on the grounds that ‘to justify this we need a new definition of the concept of “Justice”; otherwise we run the risk of confusing this concept with the levelling activity that believes it right to impose as many charges as possible on the rich until they are all at the same level as the have-nots’ (Stenglein 1892: 273; s. also Appellius 1891: 52, Berolzheimer 1907: 255, and Heilborn 1908: 53-54). All of them had forgotten Bentham’s opinion:  
 The same punishments for the same offences, is often said. This adage has an appearance of justice and impartiality, which seduces superficial minds. To give it a reasonable meaning, it would be necessary to determine beforehand what is meant by the same punishments and the same offences. An inflexible law - a law which should regard neither sex, nor age, nor fortune, nor rank, nor education, nor the moral nor religious prejudices of individuals - would be doubly vicious, as inefficacious, or as tyrannical. Too severe for some, too lenient for others; always sinning by excess or defect; under an appearance of equality, it would hide the most monstrous inequality. (Bentham 1789: Chapter VI)
- <sup>12</sup> The issue of the inequality of imposing the same amount of fine on the rich and the poor is assessed by all the European penal literature from the second half of the nineteenth century (Puccioni 1855: 204-205; Viada y Vilaseca 1890: 467; Bertola 1893: 549-550; Armengol Cornet 1894: 56; Birkmeyer 1901: 1064, 1067; Vila Miquel 1917: 169-170).
- <sup>13</sup> In Germany Heilborn (1908: 52-53) and Goldschmidt (1908: 403); in Italy Rossi (1853: 494 ff.) and Bertola (1893: 550), for whom, however, ‘it is equally distressing for everyone to reduce the source of their own satisfaction, whatever the nature of this may be’; in Spain García Goyena and Aguirre (1852: 164-165). S. in general the conclusions of the 7th International Penal and Penitentiary Congress held in Budapest in 1905.
- <sup>14</sup> It had an important legislative precedent in the Brazilian Penal Code 1830, art. 55, followed by the Portuguese Penal Codes 1852, art. 41, and 1886, art. 67. In these three codes the fine should be proportional to the offender’s income and calculated in temporal units, with a maximum of three years. Each day the offender should pay an amount of money fixed between a minimum and a maximum. However, this system lacked the two-stage design characteristic

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of the day fine, in which the first step is to fix a duration according to the gravity of the offence and the second one the daily amount of the fine according to the offender's income, as we will see immediately.

<sup>15</sup>Basically board and lodging, but also the means and instruments necessary to carry out his or her trade or profession (Lardizábal 1782: Chapter V § V.5).

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