



Recodification of Criminal Law in a Mixed Jurisdiction: The Case of Puerto Rico

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The Commonwealth of Puerto Rico enacted a new Penal Code effective May 1, 2005.¹ The Code adopts an eclectic approach, which takes into consideration civil as well as common law influence that has shaped Puerto Rico's criminal law over the last two centuries. The author of this paper—who was the Chief Reporter of the Code—will present a first hand memory of some of the issues dealt with in the process followed in drafting and enacting the Penal Code of 2004 from the perspective of statutory drafting in a mixed jurisdiction. This paper will also address the process by which the restructuring of the codified law took place; the extent to which the new Penal Code incorporated case law; and the way in which the convergence between the civil and common law traditions on criminal law theory was achieved, while attempting to maintain structural coherence throughout the Code. The analysis will consider historical and sociological factors that influenced the outcome. But it is first necessary to present a brief description of the previous Penal codes in force in Puerto Rico, in order to understand the modifications that Criminal law has undergone in this mixed jurisdiction in its quest for developing its own Penal Code.

Evolution of Penal Codes in Puerto Rico²

Three major historical periods can be identified in terms of the evolution of penal codes in Puerto Rico. The first period refers to the Law that developed during four centuries of the Spanish regime in Puerto Rico that culminated in the adoption of the Spanish Penal Code in 1879. The

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¹ Law No. 149, June 18, 2004, hereinafter, Puerto Rico Penal Code of 2004; 33 L.P.R.A. § 4629 *et seq.* (2005). For a version with commentaries see, Dora Nevares-Muñiz, *Nuevo Código Penal de Puerto Rico, Comentado* (San Juan: I.D.D., 2005).

² This section includes revised parts of an article written by the author, Dora Nevares Muñiz, "Evolution of Penal Codification in Puerto Rico: A Century of Chaos," 51 *Rev. Jur. U.P.R.* 87 (1982).

second period includes the military orders and the adoption of a common law Penal Code in 1902 that with numerous amendments was in force until 1974. The third period began after the adoption of the Constitution of the Commonwealth of Puerto Rico in 1952 and the legislative enactment of two major Penal Codes, in 1974 and 2004. These Codes received influence from both, the common law and the civil law tradition.

Spanish Law in Puerto Rico: 1508-1898

The development of Puerto Rican law can be traced to its foundation in 1508 by the Spanish colonial power. The Law of the West Indies (*Derecho Indiano*), or the colonial legislation for the Indies, applied in Puerto Rico during the sixteenth throughout the eighteenth century. Said Law was rooted in Roman law and evolved from the Law of Castile (in central Spain).³

The nineteenth century was a period of dynamic evolution in the law. In said century the Overseas Law (*Derecho Ultramarino*) saw the light, *i.e.* the law specifically enacted by Spain to be in effect in its overseas colonies: Puerto Rico, Cuba, and the Philippines. The *Derecho Ultramarino* was considered “mature, generally efficient and rather just.”⁴

The Spanish Constitution of 1876 required that the same codes of law apply to the whole monarchy. Consequently, by the end of the century, the Spanish Codes –Commerce of 1885, Penal of 1870, as amended in 1987, Civil of 1888, Civil Procedure of 1881, and Criminal Procedure, as amended in 1888– were in force in Puerto Rico. Local lawyers at that time deemed these codes as, “equitable, suitable, and effective”; also, “well adjusted to the[ir] needs.”⁵ Professor Leo S. Rowe –who performed a leading role in the adoption of the Anglo-American Codes in Puerto Rico–described the codified law, prevalent in the Island by 1898, as: “excellent, its greatest merit being definiteness in formulation, and perfect harmony of construction. A long series of decisions by the Court of Cassation of Madrid has cleared up every doubt as to the principles of interpretation.”⁶

The Spanish Code of Criminal Procedure of 1872 was extended to Puerto Rico by Royal Decree of October 26, 1888. Consequently, Puerto Rico changed from an inquisitorial to an accusatorial system of criminal procedure. Its major features were: (1) public and oral proceedings; (2) establishment of a single criminal jurisdiction; (3) separation between civil and criminal cases at the court level; (4) active participation of the public prosecutor; (5) participation

³See, José Trías Monge, *El Sistema Judicial en Puerto Rico* (San Juan: Editorial Univesitaria, 1978) chaps. 1, 2; A. García Méndez, “La administración de justicia en Indias durante la Regencia de don Fernando el Católico: 1507-1516,” 12 *Rev. Jur. Inter P.R.* 700 (1978); C. Delgado Cintrón, “Orbe histórico, jurídico y bibliográfico del Diccionario Jurídico,” 12 *Rev. Jur. Inter P.R.* 659, 661 (1978).

⁴C. Delgado Cintrón, *ibid*; of the same author, “Derecho y colonialismo: la trayectoria histórica del Derecho puertorriqueño,” 49 *Rev. Jur. U.P.R.* 133, 136-137 (1980).

⁵E.J. Berbusse, *The United States in Puerto Rico: 1898-1900* (Chapel Hill: University of North Carolina Press, 1966) at p.120.

⁶L.S. Rowe, *The United States and Porto Rico* (New York: Longmans, Green and Co., 1904) p. 160. Dr. Leo S. Rowe was a professor of political science at the University of Pennsylvania. He lived for a while in Puerto Rico, was member of the Commission to Revise and Compile the Laws of Porto Rico (1900-1901) and Chairman of the Porto Rico Code Commission (1901-1902).

of the defendant throughout the investigation; and (6) legal representation for the defendant.⁷ Jury trial was not provided for in the law.

The Spanish Penal Code of 1870, as revised in 1876, was extended to Puerto Rico by Royal Decree of May 23, 1879.⁸ This Code was the product of the Spanish Revolution of 1869.⁹ Although its drafters proclaimed it as “the most perfect work of our modern legislation and one of the best in Europe,” it was criticized by leading penal authors; *e.g.*, Dorado Montero, who described the Code as “archaic” in terms of penal thought, and Bernardo Quirós, who also referred to it as “aged” and “paralytic”.¹⁰ The fact that the crimes against the State comprised one third of the Code, made it an eminently political code.¹¹ However, in terms of legislative drafting, the Code has consistently been considered a masterpiece.¹² The criminological orientation of the Code was that of the Neo-Classical School of Penal thought. This Code was in force in Puerto Rico until 1902.

Two Legal Traditions Cross Paths in Puerto Rico

Although under the Spanish regime, Puerto Rico could not enact its own laws, it was ruled, under a common legal culture, by both general Spanish laws and either modified or specific rules decreed to apply in the Overseas Provinces. That system, based on a Civil Law tradition and rooted in same language and ethnic criteria, was the legal order at the time in which the United States acquired Puerto Rico in 1898.¹³

The year of 1898 marked a process of transculturation¹⁴ that has lasted to the present day. In this ongoing process, all aspects of Puerto Rican life, culture, legal institutions, and legal method, have been in constant struggle.¹⁵

⁷C. Delgado Cintrón, “Historia de la codificación penal en Puerto Rico”, *La Toga, Boletín del Colegio de Abogados de Puerto Rico* (December 1975), pp. 30-33.

⁸ *Colección Legislativa de España*, vol. 103. English translation published by U.S. Government Printing Office, 1904.

⁹ Luis Jiménez de Asúa, *Tratado de Derecho Penal Español* (Buenos Aires: Editorial Losada, 1956) Vol. 1, pp. 712-723. For the legal sources of the Code, see Rodríguez Ramos, “Interaction of Civil Law and Anglo-American Law in the Legal Method in Puerto Rico”, 23 *Tulane L. Rev.* 1 (1948), and Luis Muñoz Morales, *Compendio de Legislación Puertorriqueña* (Río Piedras, 1948) pp. 117-120.

¹⁰ L. Jiménez de Asúa, *id.*, p.722.

¹¹ *Id.*, p.713.

¹² See Juan del Rosal, *Cosas de Derecho Penal*, (Madrid: Imprenta Fareso, 1974), pp. 67-86; also L. McKim Garrison, “The Penal Code of Cuba and Puerto Rico”, 13 *Harvard L. Rev.* 124 (1899-1900), who said that the Code was “written with a clearness and terseness that put to shame our [The United States] modern statute-writing.”

¹³ On July 25, 1898, the United States military forces invaded Puerto Rico; on October 18th a provisional military government was established; and on December 10, 1898, the Treaty of Paris between Spain and United States was signed, ending the Spanish-American War. The Treaty of Paris, provided for the cession of Puerto Rico to the United States. In May of 1900 a civil government was established, as provided for in the Organic Act of 1900, commonly known as Foraker Act.

¹⁴ Transculturation refers to the gradual substitution of one culture by another. Germán de Granda, *Transculturation e Interferencia Lingüística en el Puerto Rico Contemporáneo (1898-1968)* (San Juan: Ateneo Puertorriqueño, 1969).

¹⁵ See José Trías Monge, *El Choque de Dos Culturas Jurídicas en Puerto Rico*, (San Juan: Equity, 1991); Liana Fiol Matta, “Civil Law and Common Law in the Legal Method of Puerto Rico: Anomalies and Contradictions in Legal Discourse”, 24 *Cap. U. L. Rev.* 153 (1995); *id.*, “Common Law and Civil Law in the Legal Method of Puerto

The Transition Period (1898-1902)

Upon the landing of the American forces, General Order No. 1 provided, among other things, that:

IX. The provincial and municipal laws, in so far as they affect the settlement of the private rights of persons and property and provide for the punishment of crime, will be enforced, unless they are incompatible with the changed conditions of Puerto Rico, in which event may be suspended by the department commander...[T]he judges and all other officials connected with the administration of justice who accept allegiance to the United States, will administer the laws of the land...¹⁶

Although the legal system—both substantive and procedural—remained *prima facie* in effect, a sudden process of changes developed. Hundreds of military and administrative orders were issued in a period of eighteen months in which the military government ruled.¹⁷

First, the military Government brought about substantial reforms in the court system. On December 2, 1898, a Supreme Court—similar to that existing in Federal States—was established and the Court of Cassation was abolished. On February 6, 1899, the Department of Justice was created and vested with the power of administering the court system. On June 27, 1899, the Provisional Court for Puerto Rico was created, with broader jurisdiction than that of other federal district courts.¹⁸ In August, the Criminal *Audiencias* and the courts of first instance and instruction were abolished; instead, Municipal and District courts were created. Municipal Judges were elected at random from a sort of lottery, while the Governor appointed District judges. Finally, Police courts were established with jurisdiction over petty offenses.¹⁹ Except for the abolishment of the latter courts and modifications providing for appointment of municipal judges by the Executive, the judicial system created during the military period prevailed until 1950.²⁰

Rico: the Transmission of Legal Discourse”, 64 *Rev. Jur. U.P.R.* 501 (1995); *id.*, “El Control del Texto: Método Jurídico y Transculturación”, 68 *Rev. Jur. U.P.R.* 803 (1999).

¹⁶ Order issued by General Brooke on October 8, 1898, in *Report of Brig. Gen. George W. Davis on Civil Affairs of Puerto Rico* (Washington, D.C.: U.S. Government Printing Office, 1900) at p. 90.

¹⁷ Professor Manuel Rodríguez Ramos counted 375 Military Orders and 443 circulars issued by the Department of Puerto Rico during the period of eighteen months in which the Military Government ruled, *op. cit.* no. 9, p. 7.

¹⁸ General Order No. 88(a) of June 27, 1899. See, C. Delgado Cintrón, “El Tribunal Federal como factor de transculturación en Puerto Rico,” 34 *Rev. Colegio Abog. P.R.* 5 (1973). In 1900, Military Governor George W. Davis wrote in his official report to the War Department that: “...the influence of his court is destined to be a potent agency in Americanizing the Island; and is certainly one of the best measures instituted since the Spanish evacuation”. Cited by C. Delgado Cintrón, in “Historia de un despropósito,” foreword to Alfonso García Martínez, *Idioma y Política*, (San Juan: Ed. Cordillera, 1972) pp. 9, 10). See also C. Delgado Cintrón, “La admisión de los abogados norteamericanos a los tribunales puertorriqueños”, 39 *Rev. Col. Abog.* 255 (1978).

¹⁹ Those courts are described in “Colonies and Colonial Government,” 18 *The Annals* 383 (1901).

²⁰ For more data on court reform, see, José Trías Monge, *El Sistema Judicial de Puerto Rico*, (San Juan: Ed. Universitaria, 1978) Chapter 4; Berbusse, *op. cit.*, n. 5, pp. 98-101; Gov. Davis’ Report (1899), *op. cit.* n. 16, pp. 26-29, 139 (see, General Order No. 118, August 16, 1899).

The Civil Government continued the trend of changes initiated by the Military Government. To mention just a few: jury trial was established by law;²¹ English instruction was mandated in public schools;²² the Law of Official Languages, providing that both English and Spanish would indistinctly be used in all Insular government departments, courts, and public offices, was enacted;²³ the government was restructured according to American principles of government and American personnel was appointed at the top of the bureaucratic pyramid;²⁴ and the name of the Island was changed to Porto Rico.²⁵

The Puerto Rico Penal Code of 1902

On March 1, 1902, the California Penal Code was adopted in Puerto Rico as the Puerto Rico Penal Code. The procedural provisions of the California Penal Code were enacted as the Puerto Rico Criminal Procedure Code. An author argues that the reason for choosing the California Penal Code was its punitive character, proper of a code of a frontier community under rapid economic development.²⁶ An additional reason for copying the California Code was the fact that the official version of the 1873 California Penal Code included both an English and a Spanish text.²⁷ It is evident, that this must have simplified the task, particularly as to translation into Spanish.²⁸

The source of the California Penal Code of 1873 was New York's Penal Code Draft, prepared by David Dudley Field in 1864. It was a restatement of existing Anglo-Saxon penal laws. As to the type of "codification" followed by the California Code, the following quotation is relevant:

²¹ Law of 12 January 1901, at 34 L.P.R.A. Ap. II, R. 111.

²² In 1905, the Commissioner of Education mandated the use of English as the major language in the entire school system. In the years that followed several orders were issued regarding the language of instruction in public schools. In July of 1949, the Commissioner decreed that Spanish was to be the language of instruction, while English will be taught as a required course in every school year. Luis Muñiz Souffront, *El Problema del Idioma en Puerto Rico* (San Juan: Biblioteca de Autores Puertorriqueños, 1950).

²³ This law was enacted on February 21, 1902; 1 L.P.R.A. §§ 51-55. Cf., *Pueblo v. Tribunal Superior*, 92 D.P.R. 596 (1965), held that the 1902 Law of Official Languages has merely a directive effect as regards to judicial proceedings in Puerto Rican Courts.

²⁴ For first hand analysis of the reorganization of the government see Rowe, *op. cit.*, 6, Chapters 7-11.

²⁵ E.J. Berbusse, *op. cit.*, no. 5, p. 81.

²⁶ Eulalio Torres, "The Puerto Rico Penal Code of 1902-1975: A Case Study of American Legal Imperialism," 45 *Rev. Jur. U.P.R.* 1, 62 (1976).

²⁷ *The Penal Code of California*, Springer, ed. (Sacramento: State printer, 1873, 1901), stacked at the Law School Library, University of Pennsylvania. Although Rodríguez Ramos, *op. cit. n. 9*, 23 *Tulane L. Rev.*, p. 21, citing from *Ex Parte Bird*, 4 DPR 223 (1903), at p. 240, says that the Penal Code was derived from Montana, that statement is not correct. Other sources state that the Penal Code of 1902 came from California, see, *Ex Parte Mauleón*, 4 DPR 119 (1903), p. 135; E. Torres, *op. cit. n. 26*, p. 20; Nevares-Muñiz, *op. cit. n. 2*, at p. 111, n. 104 after examining both the Codes of Montana (ed., 1895) derived from the California Code, and the California (ed. 1873, as amended in 1901), concludes that the source was the California Penal Code.

²⁸ Nevares-Muñiz, *op. cit. n. 2*, at p. 112. The Commission asked Mr. J. Marbury Keedy to work with the Penal Code. Mr. Keedy was a lawyer from California, who was not allowed to practice in Puerto Rican Courts due to his lack of knowledge of both Spanish language and local laws. C. Delgado Cintron, "La admisión de los abogados norteamericanos a los tribunales puertorriqueños," 39 *Rev. Col. Abog.* 255, 256 (1978). E. Torres, *op. cit. n. 26*, p. 74-75, describes Mr. Keedy as "an adventurer of the carpet-bagger variety."

... The Codes have become glorified statutes merely; the only advantage derived from codification was the institution of a systematized, accessible conceptualism in the place of a vague, confused body of case-law (not present in civil law tradition). And without constant recodification this advantage could not be maintained for any length of time. The view of Judge Pomeroy of California in 1885, is typical, and explains the fate of the California Code. He insisted that the Code, in view of its many faults, must be interpreted merely “as statement of common law rules, without regard to the literal text,” except where a change in the common law had clearly been made. Obviously such a method completely nullifies the effects of codification.²⁹

In 1938, an eminent Puerto Rican law professor, Dr. Santos P. Amadeo, described the Puerto Rico Penal Code of 1902, as amended, as follows:

Like most American Penal Codes it is a patchwork of inconsistent parts – inconsistent in definitions of substantive crimes, in the penalties provided for these crimes, and in the theories of criminal treatment and punishment advanced – and it is archaic in its procedural provisions.³⁰

The 1902 Penal Code lacked of a coherent general part that might serve as a guiding framework to the catalogue of crimes and penalties defined in the special part (*i.e.*, in the various titles contained in the Code, which, in effect, also lack a coherent order). In fact, what could be called a general part in the 1902 Code was basically a haphazardly organized set of incomplete case law definitions, with general principles of crime, justification and excuse provisions. The 1902 Penal Code was indeed one of those primitive Anglo-American Codes that restated Anglo-American case law and which was transplanted to Puerto Rico as part of the imperialist efforts of the new sovereign, at the beginning of the twentieth century.

The efforts by a sector of the population reared in the civil law tradition toward changing the imposed Code began since its very enactment, but it was not until 1974 that the long and thorny road toward a penal reform came to an end.³¹ An “eclectic” penal code was achieved,³² although, with many limitations.

²⁹ C.J. Morrow, “Civilian Codification and Legal Method for State and Nation,” 17 *Tulane Law Rev.* 351, 387 (1943) as cited by Rodríguez Ramos, *op. cit.* n. 9, 23 *Tulane Law Rev.*, at p. 37.

³⁰ Santos P. Amadeo, *The Administration of Criminal Justice in Puerto Rico*, a Preliminary Report to the Legislature of Puerto Rico, 1938, (mimeo, stacked at Law School Library, Inter American University) p. 58.

³¹ See Nevares-Muñiz, *op. cit.* n. 2, pp. 123-158 *passim*.

³² Francisco Pagán Rodríguez, “Informe Explicativo del Proyecto de Código Penal de 1967”, VI *Rev. Jur. Inter P.R.* 24, pp. 26-28 (1971).

The 1974 Penal Code

The 1974 Penal Code³³ was divided in two parts. The General Part dealt with: the fundamental and general provisions concerning its enforcement; varieties of guilt, *i.e.*, intentional and negligent; circumstances excluding or reducing criminal responsibility (justification, excuse, and non-accountability); inchoate offenses; authors and accomplices; punishments; security measures; and statute of limitations. The Special Part dealt with specific crimes and their corresponding penalties. Chapter nineteen, entitled Complementary Provisions, kept in force numerous provisions of the abrogated Penal Code of 1902, as amended, to be dealt with in the future through special laws.³⁴

The 1974 Penal Code blended provisions based on the civil law tradition, from the Penal Code draft for Argentina prepared by Professor Sebastián Soler and Italian sources,³⁵ with common law sources, *i.e.*, the American Law Institute's Model Penal Code, the California Penal Code, and the 1902 Puerto Rico Penal Code, as further amended.³⁶ The Special Part of the Code had a strong influence of the 1902 Penal Code, particularly in the definitional terms of offenses such as: murder and manslaughter, robbery, burglary, and arson, among others.

One of the harshest criticisms, came from Professor Miró-Cardona who described the original bill presented to the Legislature as:

... confusing, because two different texts have unsuccessfully been tried to be harmonized: the California Code of 1873, still in force in Puerto Rico, and the Draft of a Penal Code for Argentina of 1960, produced by Professor Sebastián Soler. Two different epochs; two different cultures; two different ways of life; two contradictory criminological conceptions; and two different penal techniques have produced a jumbled document, which is neither North American nor Argentinean and, of course neither Puerto Rican.³⁷ (Translation supplied).

Professor Helen Silving made other important criticisms to the drafts of 1967 and 1969, which were ignored when said drafts were enacted as part of the 1974 Penal Code. Among them: (1) total incongruity between substantive legislation rooted in Italian sources and criminal law processes derived from United States models; (2) the great dependence for the meaning of substantive law from evidence; (3) omission by silence of the guilt principle; and (4) a non-rational crime catalogue.³⁸

³³ Puerto Rico Penal Code, Law No. 116, January 22, 1974, as amended, 33 L.P.R. A. § 3001 et seq. (2003).

³⁴ For the provisions of the 1902 Code, as amended, which were kept in force, see Puerto Rico Penal Code, ed. 1974, Art. 278, 33 L.P.R.A. § 4622.

³⁵ J. Miró Cardona, "Letter to the President of the Senate Juridical Penal Committee", July 30, 1968 in "Borrador para un Proyecto de Código Penal Puertorriqueño," 41 *Rev. Jur. U.P.R.* 401, 405 (1972).

³⁶ Nuncio Fratallone, Hearings before the Senate Juridical-Penal Committee, on S.B. No. 19 of January 1969, January 19, 1971, p. 2.

³⁷ Miró Cardona. "Notas explicativas de las modificaciones sugeridas" in *op. cit.* n 35, p. 449 (Translation supplied).

³⁸ Silving, "Testimony in a Symposium", 41 *Rev. Jur. U.P.R.* 885 (1972), 887-895, *passim*.

The 1974 Code was indeed a patchwork, produced through the incorporation of a large number of uncoordinated provisions, taken from various codes and case law, and incorporated to Professor Pagán's original code draft. The process took place primarily in the legislative workshop where, through committee hearings, nearly four hundred amendments were grinded out. Possibly the best patch job had to do with the Code's sanctioning structure, as evidenced by the amendments that followed in the subsequent years until its abrogation in 2004.³⁹

However, the 1974 Penal Code shares the credit for reintroducing civil law tradition elements, which had been discarded while the 1902 Penal Code, was in force during the first 75 years of the twentieth century. It opened the way for the 2004 Penal Code in terms of looking towards both the civil law and the Anglo-American traditions, in an effort to draft a Penal Code that constitutes an eclectic work drawing from continental and Latin American thought and legal method, as well as from Anglo-American experience.

At the turn of a new century, Puerto Rico can look back to the previous century and reflect upon the evolution from a common law penal code toward a mixed jurisdiction code with strong influence from the civil law tradition, particularly on the general part of the Penal Code.

The four elements identified by Professor Vernon Palmer⁴⁰ that concur in the founding of mixed jurisdictions (common and civil law), have been present in the case of Puerto Rico: transfer of sovereignty, retention of civil law (e.g. Civil Code), installation of Anglo American common law and its institutions, and designation of English and Spanish as official languages.⁴¹ Since 1965 a Supreme Court Decision provided that Spanish was to be the official language in local courts.⁴² Although Spanish is the vernacular language spoken in the country, many Puerto Ricans speak both, a broken English and Spanish, and experience a conflict of cultures, live in a political status uncertainty, and have developed what has been referred to as a legal "patois."⁴³ It was within such background that the Penal Code of 2004 emerged.

³⁹ See Dora Nevares Muniz, *Derecho Penal Puertorriqueño: Parte General*, (San Juan, I.D.D., 5th rev. ed. 2005) pp.53-61.

⁴⁰ Vernon V. Palmer, ed., *Louisiana: Microcosm of a Mixed Jurisdiction*, (Durham: Carolina Academic Press, 1999) at p. 11 (Introduction).

⁴¹ Law of February 21 of 1902, 1 L.P.R.A. § 55-57. Law No. 4 of April 5, 1991, 1 L.P.R.A. § 56-58, that established Spanish as official language, repealed this law, but Law No. 1 of January 28, 1993, 1 L.P.R.A. § 59, reinstated both English and Spanish as official languages.

⁴² *Pueblo v. Tribunal*, 92 DPR 596 (1965).

⁴³ The term was used by the President of the Supreme Court, Hon. José Trías Monge on a speech delivered at the General Assembly of the Puerto Rico Bar Association, in San Juan, September 6, 1975; also in José Trías Monge, "La enseñanza del Derecho y la formación de un Derecho propio," 11 *Rev. Jur. U Inter P.R.* 771 (1977). Associate Justice of the Supreme Court, Hon. Marcos A. Rigau, recalled one of Puerto Rico's leading poets who referred to Puerto Rico as "burundanga" –i.e. a jumbled mixture of different things which creates confusion– warning the legal order from falling into it. José Trías Monge, "La formación del abogado y nuestro Derecho: ética-técnica-idioma," 10 *Rev. Jur. Inter P.R.* 1 (1976).

The Penal Code of 2004

This section will analyze the following topics: the process by which the restructuring (recodification) of the codified law took place; the extent to which the new Penal Code incorporated case law; and the way toward achieving a convergence⁴⁴ between civil and common law in penal law theory, while attempting to maintain structural coherence throughout the Code. The discussion will also consider historical and sociological factors that influenced the outcome.

The drafting process and preliminary studies of the Penal Code of 2004

The drafters knew that both the civil law and the common law traditions could make valuable contributions to the process of drafting the Code, provided that the two traditions were duly respected and understood. It was also necessary to keep them “in equilibrium, so that one does not overshadow or obliterate the other”.⁴⁵ Yet, this was not easy. First, because of the ongoing struggle between common and civil law traditions in legal method in Puerto Rico; and second, because the legislative process takes into consideration many other factors, such as the pressure of different interests groups, characteristics of the criminal justice system, economic conditions and prevailing criminality in the country, constitutional limits that apply to criminal law, and the values of the society, among others. The binding elements that kept the balance were constitutional principles of human rights and the legality principle.

The process of drafting the penal code in Puerto Rico included various base or preliminary studies. Among them, a comprehensive comparative legal analysis of over twenty penal codes from civil law and mixed jurisdictions, as well as the Anglo American legal tradition.⁴⁶ The comparative analyses of international penal codes⁴⁷ also included model codes, such as the American Law Institute’s Model Penal Code, the “Codigo Penal Tipo” for Latin America, Professor Paul Robinson’s model penal code draft,⁴⁸ as well as the 1974 Puerto Rico Penal Code then in force⁴⁹ and prior penal code drafts for Puerto Rico.⁵⁰

⁴⁴ Convergence refers to the evolution of legal institutions within different legal systems where the institution of one system resembles the other and the legal norms, principles, and scholarly comments of both are used in equal measure, “even regarded as authoritative as each other”. Julian Hermida, “Convergence of Civil Law and Common Law in the Criminal Theory Realm” 13 *U. Miami, Int. & Comp. L. Rev.* 163, (2005) at p. 164.

⁴⁵ William Tetley, “Mixed Jurisdiction: Common Law vs. Civil Law (Codified and Uncodified), 60 *Louisiana Law Rev.* 677 (Spring 2000) at p. 680.

⁴⁶ D. Nevaes Muñiz, ed. *Estudios Comparados de Códigos Penales*, 2002, published as docs. 7c and 8, compact disc, Historial Legislativo del Codigo Penal de 2004, [Legislative History of the Puerto Rico Penal Code]; also at <http://www.tribunalpr.org/leyes/codigopenal.htm>.

⁴⁷ E.g., Germany, Spain, France, Portugal, Sweden, Finland, Check Republic, England, Argentina, Chile, Colombia, Paraguay, El Salvador, Mexico, Cuba, Venezuela, Canada, United States.

⁴⁸ Paul H. Robinson, Natasha R. Goldstein, and Peter D. Greene, “Making Criminal Codes Functional: A Code of Conduct and a Code of Adjudication”. 86 *J. of Crim. Law & Criminology* 304 (1996), Appendices 1 (Draft Code of Criminal Conduct) and 2 (Draft Code of Adjudication).

⁴⁹ *Op. cit.* n. 33; for an edition with commentaries, see, D. Nevaes-Muñiz, *Código Penal de Puerto Rico, Revisado y Comentado* (San Juan, I.D.D. 7th rev. ed. 2001).

⁵⁰ These penal codes were drafted by professors of the major law schools in Puerto Rico, Helen Silving, *Constituent Elements of Crime* (Springfield: Charles C.Thomas, 1967); José Miró Cardona, “Borrador para un

The literature evaluating previous penal codes of Puerto Rico (eds. 1902, 1974) including a critical evaluation of case law interpreting them was also examined. New analyses were conducted.⁵¹ Furthermore, it was necessary to evaluate other laws that were to be affected by the Penal Code in order to make the corresponding amendments.⁵² As a result, when the Penal Code was enacted, thirty- four other laws were approved as part of the penal reform.

Two major empirical studies were conducted:⁵³ 1) a survey of perception of crime severity among the population, and 2) an empirical study of actual time served in prison by the convicts under the punishment provisions of the 1974 Penal Code, as amended.

The study of perception of crime severity was aimed at obtaining the crime severity perceptions of Puerto Rican population.⁵⁴ In theory, crimes shall reflect the societal values, and such values shall also be reflected on just punishments. As long as perceptions of crime severity are interpreted in harmony with the legal tradition, comparative law, and constitutional rights, they shall be reflected in both crimes and punishments.

The study revealed that for Puerto Rican society, the most severe crime is murder, followed by incest and rape. The perception of severity increases in these offenses when the victim is either a minor or a helpless person. Offenses against public security, public health, and corruption followed in perception of severity.

The study validated the following general principles used in comparative criminal law regarding crime severity: offenses against human life or the personal integrity are deemed more serious than property offenses; intentional crimes were to be punished harsher than negligent offenses; inchoate conduct is considered less serious than completed offenses; the severity of property crimes is directly related to the loss of money or value of property involved; in offenses against public administration, its severity is directly related to the hierarchy of the public servant; economic crimes are perceived more serious when the offender is a business entity rather than a person.

The study of perception of crime severity was used as a guide of the societal values and perceptions of crime severity when drafting crimes and punishments, as well as when drafting aggravated offenses, identifying aggravating circumstances to the punishment, and providing

Proyecto de Código Penal Puertorriqueño”, 41 *Rev. Jur. U.P.R.* 401 (1972); Francisco Pagán Rodríguez, “Proyecto de Código Penal de Puerto Rico”, 6 *Rev. Jur. U.I.A.* 1 (1971).

⁵¹ D. Nevares Muñiz, *Evaluación del Modelo de Penas del Código Penal* (2001); *idem*, *Informe de Leyes que enmiendan el Código Penal de Puerto Rico*, docs. 3 and 4, compact disc, Historial Legislativo del Código Penal de 2004, [Legislative History of the Puerto Rico Penal Code]; also at <http://www.tribunalpr.org/leyes/codigopenal.htm>.

⁵² E.g. Rules of Criminal Procedure, Juvenile Law, Corrections Law, Probation Act, Parole Law, Law of the Certificate of Criminal Record, Domestic violence Law, Governmental Ethics Law, among others.

⁵³ Respectively, MMOR Consulting and Advanced Research Center, *Estudio de Valoración de Severidad de Delitos en Puerto Rico*, [Empirical survey of the perception of crime severity in Puerto Rico] 2003, doc. 9; and Legislative Services Office, *Sentencia dictaminada en el Tribunal vs. Pena Cumplida* [Sentence Imposed vs. Time Served] 2003, doc. 10, compact disc, Historial Legislativo del Código Penal de 2004, [Legislative Record of the Puerto Rico Penal Code]; also at <http://www.tribunalpr.org/leyes/codigopenal.htm>.

⁵⁴ A survey of perception of crime severity uses methodology developed in the social sciences by Thorsten Sellin and Marvin Wolfgang, to assess relative seriousness with which society views a broad range of criminal events. *The Measurement of Delinquency* (New Jersey: Patterson Smith Series in Criminology, rep. 1978; originally published in 1964 by John Wiley and Sons). This methodology has been replicated in multiple research studies, see, M. Wolfgang, “Cross-Cultural Consensus and Dissensus about the Gravity of Crime,” XIX *Rev. Jur. Inter P.R.* 273 (1985).

special treatment to certain victims in the drafting of crimes and punishments. They were not used to determine the exact punishment of each offense, since the survey was not aimed at evaluating penalty terms, but perception of crime severity in terms of social harm.

The other empirical study that was conducted as part of the penal code reform was an assessment of actual time served in prison by convicted offenders.⁵⁵ A previous study done in 1992 showed that offenders sentenced by serious crimes were serving considerably less time than the term imposed by the judge, due to good time credit and post sentence diversion procedures allowed by law.⁵⁶ The perception in the community in subsequent years was that criminals were not serving their sentences. In 2003, the study revealed that prisoners convicted of serious crimes were serving about one third of the time imposed in the sentence. For example, in the group whose prison term was reduced through a community diversion program, the average sentence for a second-degree murder was 28 years, but the average of time meted out in prison was 5.9 years. In the group that served the totality of his sentence in prison, the average sentence imposed for murder was 21 years, but that sentence was served in 8 years.⁵⁷

The Penal Code of 2004 adopted truth in sentencing. The study of time served was used in the selection of the prison terms of the four different classes of felonies.

Legislative hearings

Expert opinion of the Penal Code Bill was obtained during legislative public hearings. Hearings were conducted in two rounds in the Senate, before drafting the bill and after filing the bill. The House of Representatives conducted both public and executive hearings.

Two leading contemporary European experts participated in public hearings at the request of the Senate and provided valuable advice. They were, Prof. Santiago Mir Puig, from the University of Barcelona, and Baroness Vivien Stern, senior research fellow, at the International Center for Penal Studies, London University.

As part of the legislative process it was necessary to consider opinions of interest groups and include some provisions in the Code that do not respond to the best legal drafting principles, but rather, to public pressure groups. This was the case of offenses such as adultery, originally incorporated in the 1902 Code, and maintained in the 1974 and 2004. Anglo-American penal codes contain similar provisions.

Structure of the Penal Code of 2004

How should the Penal Code for the new millennium be structured to best perform its functions? Professor Paul Robinson identifies two different functions to be harmonized in a penal code. They are: 1) the penal code must perform the *ex ante* function of announcing the rules of conduct

⁵⁵ Legislative Services Office, *Sentencia dictaminada en el Tribunal vs. Pena Cumplida* [Sentence Imposed vs. Time Served] 2003, doc. 10, compact disc, Historial Legislativo del Código Penal de 2004, [Legislative History of the Puerto Rico Penal Code]; also at <http://www.tribunalpr.org/leyes/codigopenal.htm>.

⁵⁶ Dora Nevares-Muñiz "Sentencias que Realmente se Cumplen", 24 *Rev. Jur. Inter P.R.* 139 (1990); Miguel Valencia, "Estimación del Impacto en la Población Penal de las Sentencias Ponderadas a la Severidad de los Delitos", 27 *Rev. Jur. Inter, P.R.*, 161-174 (1992).

⁵⁷ Legislative Services Office, *Sentencia dictaminada en el Tribunal vs. Pena Cumplida* [Sentence Imposed vs. Time Served] 2003, doc. 10, compact disc, Historial Legislativo del Código Penal de 2004, [Legislative History of the Puerto Rico Penal Code], at pp. 68 and 64; also at <http://www.tribunalpr.org/leyes/codigopenal.htm>.

under its penal jurisdiction; and 2) it must perform the *ex post* function of establishing for the participants in the criminal justice process the principles by which violations of the rules of conduct are to be adjudicated.⁵⁸

Rules of conduct, which comprise the specific offense definitions, in order to be effective, shall be clear, simple, and objective. As long as the citizens understand the rules of conduct (offense definitions), the penal code will prevent and dissuade them from violating said rules. Civil law tradition methodology serves this purpose better than case-oriented common law tradition offense definitions.

In contrast, the rules of adjudication apply after the violation of the rule of conduct, or the commission of a crime, and are directed to lawyers, prosecutors, and judges. The rules of adjudication require a degree of sophistication and complex judgments, which depend on the specific punishment goals adopted by the code. Rules of adjudication are located in the General Part of penal codes.

The Penal Code of 2004 is organized in two books and has a total of 313 articles. The internal structure of the Code in terms of a general part and a special part is similar to that of modern codes, from both, continental Europe and the United States.

Book One: General Provisions is divided into three Titles concerning: the general principles of application of Criminal Law, elements of crime and criminal conduct, and punishment provisions. Book One has a strong influence from civil law tradition, particularly in the general principles and crime theory. Punishments provisions integrate elements from both, common law and civil law tradition.

Book Two: Definitions of Specific Crimes is divided into five Titles: Offenses against Persons, Offenses against Property, Offenses against Public Security, Offenses against Governmental Functions, and Offenses against Humanity.

Criminal Law Theory

Substantive criminal law in civil law tradition jurisdictions does not differ greatly from Anglo-American common law. There are similarities as to the conduct that is to be considered “criminal”, and the same general approaches to punishment are discussed and debated throughout Western culture.⁵⁹ Rather, the differences lie in terms of legal drafting and methodology. One of the areas where these differences are notable is in the theory of crime. Although in terms of meaning, it is fair to assess that at present they are converging.⁶⁰

Civil law tradition, including continental Europe and Latin America, elaborates its crime theory in terms of the constituent elements of crime.⁶¹ These elements are: 1) an action (or omission); 2) such action satisfies the definition of a specific offense type;⁶² 3) illegality⁶³ (the conduct is not justified by law); 4) accountability (capacity of the person to have the required

⁵⁸ Paul H. Robinson, “Structuring Criminal Codes to Perform their Function,” 4 *Buffalo Criminal L. Rev.* 1 (2001).

⁵⁹ John Henry Merryman, *The civil Law Tradition* (Stanford University Press, 1969), 132.

⁶⁰ J. Hermida, *op. cit.* n. 44.

⁶¹ Luis Jiménez de Asúa, *La Ley y el Delito* (Buenos Aires: Editorial Sudamericana, 1978), pp. 205-206; D. Nevares-Muñiz, *op cit.* n 39, chap. 5.

⁶² This element is referred to in Spanish as *tipicidad*, and, as *tatbestand*, in German.

⁶³ This element is referred to in Spanish as *antijuricidad* and, as *rechtswidrigkeit*, in German.

mental state); 5) culpability (the action conforms to the required mental state in the specific offense type and is not excused); and 6) a penal sanction. It is in this crime theory that both, the 1974 and 2004 Penal Codes of Puerto Rico are grounded.⁶⁴

An author refers to Anglo-American criminal law as a “hodge-podge of loosely related, overlapping, and imprecise doctrines.”⁶⁵ Crime is regulated in the common law tradition through the doctrines of: concurrence of *actus reus* and *mens rea*, absence of justification, and excuse. The *actus reus* includes the conduct, circumstance and result elements of an offense, as well as the supporting doctrines of causation, voluntary act, omission, and possession. The *mens rea* refers to the mental state at the time of the conduct that constitutes an offense. In the definitional terms of the offenses, different acts require different degrees of *mens rea*.

The most widely discussed effort to precise the *actus reus* and *mens rea* in the common law tradition, is the Model Penal Code.⁶⁶ The Model Penal Code defines the objective elements of an offense as: a conduct, the attendant circumstances, or a result of conduct.⁶⁷ Causal relationship between conduct and result is defined in detail.⁶⁸ The culpability requirement or subjective elements are: that the person acted purposely, knowingly, recklessly, or negligently.⁶⁹ Each kind of culpability is specifically defined, as is usual in common law methodology. The above definitions or elements provide a lengthy enumeration of specific applications or exceptions.

The drafters of the Model Penal Code were not concerned with grounding the Code in a theory of penal law and of penal codification.⁷⁰ Nonetheless, Professor Fletcher says, that the drafters of the Model Penal Code “may not have been aware that they had committed themselves to a “causal”⁷¹ as opposed to a “teleological” [or goal-oriented] theory of action”.⁷²

The Puerto Rico Penal Code of 2004 followed the goal-oriented (or “final conduct”) theory of action from civil law jurisdictions, as adopted in Germany, Spain, Italy, Argentina, and other Latin American countries. The conduct of the offender, either an act or an omission, is considered voluntary and end-oriented. The causal course of the action is defined in terms of the will of the participant, that is, it is participant-oriented.

Puerto Rico Penal Code provisions dealing with both, the objective (or external) and the subjective (or internal) part of an offense or criminal conduct are goal oriented. Substantive offense definitions limit subjective liability to either intentional or negligent state of mind. Negligent liability in Criminal law is the exception and requires foresight of the result. The

⁶⁴ Dora Nevares Muñiz, *Derecho Penal Puertorriqueño*, *op. cit.* n. 39, chap. 5;

⁶⁵ L.A. Zaibert, “Philosophical Analysis and the Criminal Law,” 4 *Buffalo Crim. L. Rev.* 101 (2000) at P. 112.

⁶⁶ American Law Institute, *Model Penal Code* (official draft, 1962; official draft and revised comments, 1985, 6 vols).

⁶⁷ M.P.C. § 1.13 (9)

⁶⁸ M.P.C. § 2.03

⁶⁹ M.P.C. § 2.02. These four kinds of states of mind are not mutually exclusive, and are confusing, since they refer to cognitive aspects in some cases and to volitional ones in others. Julian Hermida, *op. cit.* n. 44, p. 204.

⁷⁰ Markus Dirk Dubber, “Penal Panopticon: The Idea of a Modern Penal Code,” 4 *Buffalo Crim. L. Rev.* 53 (2001), p. 62; George P. Fletcher, “The Dogmas of the Model Penal Code,” 2 *Buffalo Crim. L. Rev.* 3 (1998), p.7.

⁷¹ The causal theory traces its origins to Franz von Liszt, Gustav Radbruch and Ernest Beling, during late 19th Century. It conceives action as a voluntary physical movement that causes a result that is described in the definitional terms of the offense.

⁷² George P. Fletcher, *op. cit.* n. 70, p.5

objective aspect of the conduct in specific offense types is expressed in terms of prohibited either active or omissive conduct, or causing a result. In terms of legal style, these provisions are concisely defined following civil law tradition criteria.

The table on the next page compares the specific provisions of the Puerto Rico Penal Code of 2004 with concepts from the civil law tradition crime theory and with provisions of the Model Penal Code, as regards to the objective (the action or *actus reus*) and subjective (culpability or *mens rea*) elements of crime.

Crime / criminal conduct	Puerto Rico Penal Code, ed. 2004,	Civil law theory	Common law/ Model Penal Code.
Objective elements	<p>Art. 18 – Crime can only be done by action or omission</p> <p>Art. 19 – Commission by omission - -Participant had duty to avoid the result and conduct <i>ex ante</i> produced the risk that caused the result.</p> <p>Art. 23 – Objective imputation of liability --Conduct of the participant caused a sufficient and unjustifiable risk that caused the result.</p>	<p>Action</p> <p>-Pure or formal acts or omissions</p> <p>-Commission by action or by omission</p> <p>- Objective imputation of liability</p>	<p>Actus reus/</p> <p>Sec.2.01 – voluntary act; omission; possession</p> <p>Sec. 2.03 –causality</p>
Subjective elements	<p>Culpability</p> <p>Art. 22 – Principle of subjective responsibility --Offenses in the Penal Code require intention, except that negligence is expressly required. --No strict liability</p> <p>Kinds of culpability:</p> <p>Art. 23 – Intention</p> <ul style="list-style-type: none"> - The crime [act] has been done by a voluntary conduct aimed at executing it. - The crime [act] is the natural consequence of the voluntary conduct of the participant. - The participant wants his conduct knowing that it implied a considerable and not allowed [unjustifiable] risk to cause the crime [act]. <p>Art. 24 – Negligence</p> <p>The participant did not exercise due care of a reasonable person in the specific circumstances to avoid the result.</p>	<p>Culpability</p> <p>System closed to negligent offenses</p> <p>No strict liability</p> <p>Kinds of culpability:</p> <p>Dolus</p> <ul style="list-style-type: none"> - Direct Dolus of 1st degree - Dolus of 2nd degree - Eventual Dolus <p>-Culpa – (negligence)</p> <ul style="list-style-type: none"> -Unconscious culpa: violation of duty of care to avoid the result -Conscious culpa: violation of duty of care + foresight 	<p>Mens rea/ Culpability</p> <p>Sec. 2.0 - Strict liability permitted</p> <p>Sec. 2.02 – Culpability required for all material elements of the offense.</p> <p>Kinds of culpability:</p> <ul style="list-style-type: none"> -Purpose: desires his conduct to cause a particular result -Knowledge: is aware his conduct is practically certain to cause a particular result -Recklessnes: is aware of a substantial and unjustifiable risk <p>-Negligence: should be aware of a risk that his conduct might cause a particular result.</p>

As the table reveals, the 2004 Puerto Rico Code formulated both, the subjective and the objective elements of criminal conduct, similar to the civil law crime theory. Despite differences in terminology, methodology, and historical development, the four mental states of the common law Model Penal Code found acceptable equivalencies in both, civil law tradition crime theory⁷³ and the Puerto Rico Penal Code. The Model Penal Code's definitions of purpose, knowledge, recklessness, and negligence, are equivalent to the *dolus*, *dolus eventualis*, conscious *culpa*, and unconscious *culpa*, from civil law tradition;⁷⁴ and to the three modes of intention (Art. 23) and the definition of negligence (Art.24) in the Puerto Rico Penal Code.

Although both civil law and common law traditions require causality in those offenses, which are defined in terms of a prohibited result, their respective analyses are different. The causality "but for" and "proximate cause" test at common law, is only the first step in civil law tradition analysis (Germany and Spain). Once the causal link is established, or it is determined that the participant caused the prohibited result in the specific offense, then it is necessary to determine, if his/her illegal conduct was sufficient to cause the result. The Code of 2004 adopts civil law tradition "objective imputation" analysis in offenses that prohibit a result.⁷⁵

Common law codes allow strict liability in Criminal law, but civil law tradition codes do not permit it. An example is the common law misdemeanor manslaughter rule; *i.e.*, when the death is the result of an illegal act or misdemeanor, it is considered as manslaughter. The Puerto Rico Codes of 1902 and 1974 typified this offense,⁷⁶ but it was eliminated in the 2004 Code since the guilt principle provides for no strict liability in Criminal law.⁷⁷

Similarly, the Anglo-American felony murder, typified in the previous Codes of 1902 and 1974,⁷⁸ is reformulated in the Code of 2004.⁷⁹ The traditional felony murder rule provides that any death—whether intentional, unintentional or accidental-- caused during the commission or attempt to commit a specific felony mentioned in the offense definition, constitutes first-degree murder. The reformulation consists of introducing two civil law crime theory subjective elements: 1) the intention to kill, and; 2) the murder shall be a natural consequence of the base felony. As the Senate Bill Report wrote, "only in these circumstances the murder results from the dangerousness inherent to the base felonies and not as a fortuitous consequence."⁸⁰ Besides, the felony murder shall be "subsumable in the definition of murder" [causing the death of a human

⁷³ Paul Robinson, "Should the Criminal Law Abandon the Actus-Mens Rea Distinction?" in Stephen Schute, John Gardner and Jeremy Horder, eds. *Action and Value in Criminal Law* (Oxford: Clarendon Press, 1993), p. 189.

⁷⁴ Felix Cifredo, "La Intención y otros Elementos Subjetivos del Injusto Penal en los Sistemas Anglosajón y Civilista: hacia una Teoría Unitaria", 63 *Rev. Jur. U.P.R.* 39 (1994); Luis Jiménez de Asúa, *op. cit.* n. 9 vol 1, p. 669; J. Hermida, *op. cit.* n. 44, p. 181.

⁷⁵ D. Nevares-Muñiz, *op. cit.* n. 39, § 5.4.2 and §5.4.3 at p. 178; Luis E. Chiesa-Aponte, *Derecho Penal Sustantivo* (San Juan: JTS, 2007), pp. 120-121, 129-132.

⁷⁶ Art. 203, P.R. Penal Code (1902), 33 L.P.R.A. §635; Art. 86, P.R. Penal Code (1974), 33 L.P.R.A. § 4005.

⁷⁷ Art. 22, P.R. Penal Code (2004), 33 L.P.R.A. § 4520.

⁷⁸ Arts. 201 P.R. Penal Code (1902), 33 L.P.R.A. §633; Art. 93, P.R. Penal Code (1974), 33 L.P.R.A. §4012. See comparative analysis of the impact of this rule in Puerto Rico, in Manuel J. Fernós, "La Transculturación en el Derecho Penal y Procesal Penal Puertorriqueño," XIX *Rev. Jur. Inter P.R.* 320 (1985), at pp. 323-326.

⁷⁹ Art. 106 P.R. Penal Code (2004), 33 L.P.R.A. § 4734.

⁸⁰ Puerto Rico Senate, Juridical Commission, Legislative Report to establish a Penal Code, at p. 44; doc. no. 50, compact disc, Historial Legislativo del Código Penal de 2004, [Legislative History of the Puerto Rico Penal Code]; also at <http://www.tribunalpr.org/leyes/codigopenal.htm>.

being with intention to kill], and does not refer to any intentional death by part of the offender.”⁸¹ Since 1957, England abolished the felony murder rule, and many states in the United States have modified the rule.⁸²

Justification and excuse are other of the areas in which, except for the defense of entrapment, both, civil law and Anglo American common law traditions converge. In Puerto Rico, as already stated, this process started with the Code of 1974. The drafting of the defenses of self-defense and defense of others, justified legal right or duty, and duress, were the result of the synthesis of several specific and case law provisions from the 1902 Penal Code. The defenses of error of fact and hierarchical obedience were drafted utilizing comparative law from civil law jurisdictions. The Supreme Court quoting German authorities, as to the mistake of either fact or legal prohibition, interpreted the defense of mistake. Entrapment was drafted based on case law from the United States Supreme Court.

The Penal Code of 2004 reformulated the justification defense of necessity following civilian elements, while excusable necessity [*estado de necesidad exculpante*] was included as a part of the defense of duress. The Code included the defense of *de minimis*, that is when the conduct is neither justified nor excused, but tolerated due to its insignificance.

The defense of mental insanity was drafted both, in 1974 and in 2004, similar to the Model Penal Code. Unconsciousness and other transitory mental conditions that impair the capacity to form subjective penal liability were drafted using comparative law sources from Germany and Spain.

Statutory interpretation

The rule of statutory interpretation set forth in the Puerto Rico Penal Code⁸³ achieves internal convergence by joining the common law rule of restrictive interpretation with the civil law tradition rule that gives priority to the legislative intention of the statute,⁸⁴ by examining the legislation as a whole and the legislative history, including preparatory works.⁸⁵ The Code also includes rules for the case of conflict of statutes following the civil law tradition rules known as: *lex specialis*, *lex subsidiarie*, and *lex consumens*.⁸⁶ Due to the influence of common law tradition elements in previous codes, the 2004 Code included many definitions in a separate provision, updated from the previous 1974 Code.⁸⁷

Punishment provisions

The punishment provisions of the Penal Code of 2004 were drafted according to constitutional human rights principles: e.g. human dignity recognition, prohibition against cruel and unusual punishments, requirement that correctional institutions safeguard human rights, providing for

⁸¹ *Ibid.* (translation supplied).

⁸² Fernos, *op. cit.* n. 78.

⁸³ Art. 13 – interpretation of words and phrases, 33 L.P.R.A. § 4641.

⁸⁴ See D. Nevares-Muñiz, *op. cit.* n. 39, § 4.5, for an analysis of statutory interpretation in Puerto Rico and details of the convergence between both rules.

⁸⁵ The legislative history of the Puerto Rico Penal Code, at <http://www.tribunalpr.org/leyes/codigopenal.htm>.

⁸⁶ Art. 11 – conflict of statutes, 33 L.P.R.A. § 4640.

⁸⁷ Art. 14 – definitions, 33 L.P.R.A. § 4642.

rehabilitation of imprisoned convicts as required by the Puerto Rico Constitution, due process, and the recognition of criminal law as *ultima ratio* for intervening with conduct in society.

Art. 4 of the Penal Code of 2004, entitled Principles of the Penal Sanction, includes proportionality as part of the legality provisions. Art. 4 reads: “The punishment or measure of security imposed for a crime must be: proportional to the seriousness of the crime, necessary, and adequate in order to achieve the purposes of this Code and cannot harm human dignity”. The purposes of punishment are set forth in art. 47 as: “crime prevention and protection of society, just punishment that is both proportionate to the seriousness of the offense and the responsibility of the offender, rehabilitation, and doing justice to the victims”.

In terms of internal structure of the Code as regards to providing penalties according to the severity of the crime, was influenced by both, the Model Penal Code (classification of degrees of felonies) and the continental Penal Codes (internal structure of punishment provisions and rules for weighting of aggravating and attenuating circumstances to the punishment).

The Code lists all the attenuating and aggravating circumstances (articles 71-72) and includes a set of rules for its application.⁸⁸ The source of these provisions is the Spanish Penal Code (ed. 1995). This follows a trend in continental codes aimed at eliminating arbitrariness at the time of imposing a sentence and accomplishing proportionality between the seriousness of the crime and the responsibility of the convict.

The 2004 Code provides for truth in sentencing. Sentence credits will be limited to those who earn them by studying or working, and only ten percent of the sentence may be reduced. Also, new restorative sanctions have been conceived and alternatives to imprisonment in offenses of intermediate severity.

Crimes are divided into felonies and misdemeanors. Felonies are grouped in four categories, from first to fourth degree, depending on the number of years of recommended prison time. First and second degree felonies will have to serve their imprisonment sentences in natural years, while third and fourth degree felonies will have other alternatives to imprisonment available.⁸⁹ Alternatives to imprisonment are: probation, house arrest, therapeutic restriction, community services, and restitution. Parole in prison sentences depends on the severity of the offense.

For misdemeanors, judges can choose from three new sanctions: (1) day-community service for up to 90 days, where each day equals 8 hours; (2) day-fine for up to 90 days, where a day-fine unit will be individually set between \$1 and \$44, depending on the economic status of the convict, and which cannot exceed \$5,000; and (3) house arrest for up to 90 days.⁹⁰

In order to comply with a constitutional provision that requires that the correctional institutions provide for the rehabilitation of the sentenced felon, the Code of 2004 provided that if the state can prove in a judicial hearing that the convicted felon has in fact, rehabilitated, the remaining term of imprisonment is set aside.⁹¹

⁸⁸ 33 L.P.R.A. §§ 4698-4702.

⁸⁹ 33 L.P.R.A. §§ 4644, 4694, 4696.

⁹⁰ 33 L.P.R.A. §§ 4644, 4683-4688.

⁹¹ Art. 104, 33 L.P.R.A. § 4732.

New measures encourage the rehabilitation of the prisoner. Article 51 (Therapeutic restriction),⁹² is a new sanction where the convict will be held at a public or private institution and will receive adequate treatment for drug, alcohol, or gambling dependence. If he rehabilitates effectively, the court is authorized to exonerate the person after serving its sentence. Another new measure, Article 98 (Restitution for harm caused),⁹³ states that if the offender compensates the victim and both victim and public prosecutor agree the indictment could be vacated. This provision applies to misdemeanors and third and fourth degree felonies, and allows for establishment of mediation procedures.

Conclusions

Puerto Rico lived through four centuries of civil law tradition, and a century of imposition of Anglo-American law. Between 1902 and 1974, the Penal Code in force was interpreted according to common law sources.⁹⁴ The enactment of the 1974 Penal Code reintroduced civil law elements in criminal law legal method. The Puerto Rico Supreme Court uses civil law authorities, when appropriate, in its decisions.⁹⁵ Oftentimes uses both, civil law tradition and Anglo-American authorities, resulting on convergence.⁹⁶

The process followed in drafting and enacting the new Penal Code of 2004 described above, shows the efforts of a mixed jurisdiction to develop a Penal Code rooted in both, the civil and common law traditions. The aim of the drafters was to achieve a convergence between civil law and common law traditions on Criminal law theory, while maintaining juridical and structural coherence throughout the Code. The task was undermined to a certain extent, by the pressure of interest groups in the legislative process and by the strong influence of common law elements as to both, the judicial method and legal education throughout the last century. It remains to be seen whether the courts are going to overcome the common law influence and interpret correctly the many civil law tradition elements that have been included in the 2004 Code, both in the General Part and in the specific terms of many offenses.

⁹² 33 L.P.R.A. § 4679.

⁹³ 33 L.P.R.A. §4726.

⁹⁴ Since the California Penal Code, was the direct antecedent of the 1902 Code, case law before that date constituted mandatory precedent in Puerto Rico. Later decisions from California were considered permissible precedents. *Pueblo v. Rivera*, 7 D.P.R. 35 (1904); *Corretjer v. Tribunal*, 72 DPR 754 (1951); *Pueblo v. Chirino*, 69 DPR 525 (1949).

⁹⁵ The Supreme Court of Puerto Rico frequently refers to civil law tradition authors, e.g., Santiago Mir Puig, *Derecho Penal: Parte General* (Barcelona: Ed. Reppertor, 7ma ed. 2004); Hans Heinrich Jescheck & Thomas Weigend, *Tratado de Derecho Penal Parte General* (Comares, 2000); Claus Roxin, *Derecho Penal Parte General* (Civitas, 1997); Eugenio Zaffaroni, *Derecho Penal: Parte General* (Buenos Aires: Ediar, 2000); Sebastian Soler, *Derecho Penal Argentino* (Buenos Aires: Tipografía Editora Argentina, 1951); Eugenio Cuello Calón, *Derecho Penal: Parte General* (Barcelona: Bosch, 1980); L. Jiménez de Asua, *op. cit.* n. 9; among others.

⁹⁶ The following decisions from last year quote both, civil law tradition sources and Anglo-American sources, *Pueblo v. Padín Rodríguez*, 2006 TSPR 165 (Fiol-Matta, dis.); *Pueblo v. Collazo Gonzalez*, 2006 TSPR 39; *Pueblo v. Candelario Ayala*, 2005 TSPR 165; *Pueblo v. Gonzalez Ramos*, 2005 TSPR 134, among many others in previous years.

Furthermore, the amendments to be introduced in the near future to the Penal Code should be integrated to the Code, as to structure, general theory, and legislative drafting techniques. The Code provides for the creation of a permanent revision body that is to draft and recommend amendments to the Code, as well as to study special laws and make recommendations to the Legislature.⁹⁷ I hope that the future amendments to the Penal Code preserve the coherent convergence of both legal traditions as to structure, crime theory, and legislative drafting.

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⁹⁷ Art. 312, 33 L.P.R.A. § 4938.