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## Penal enlightenment in Spain: from Beccaria's reception to the first criminal code<sup>1</sup>

The Enlightenment and criminal law: the changing perspective of legal history

Even when it is not easy to define all the elements that should be included in the semantic field of the notion of the Enlightenment, there is no doubt that the criticism and reform of the Ancient Régime's criminal justice system has always been considered part of its essential core. However, it is still hard to pinpoint a clear and precise criterion to determine which kinds of criticisms or reforming projects can be described as part of a genuine enlightened program and which of them were just a simple resignification of some of the old legal culture standards. There is, probably, not one single answer for this question since, as it has been said, there was no such thing as "the" Enlightenment as "a unified and universal intellectual movement".<sup>2</sup> Consequently, every text should be read within its own context, given that the moderate attitude of Montesquieu towards certain legal practices of the old French Monarchy, like the use by the kings of the *lettre de grace*, for example, is not the same as the radical statement held by Voltaire according to which, in order to have good laws all the former laws had to be burnt first.<sup>3</sup> Deeper or subtler divergences could be drawn comparing discourses belonging to authors that, notwithstanding, are all considered by historiography as "enlightened".

Nonetheless, if we look at the legal historiography we find that all the references to the basic patterns of the enlightened reforms in the field of penal thinking lead to the little book written by the Marquis of Beccaria in 1764. Considered one of the "founding fathers" of penal reformers, his book, *On crimes and punishment*, has served as the model for comparing intellectual productions and legal reforms concerned with penal justice during the second half of the 18th century. It is almost a commonplace to say that since Beccaria's *On crimes and punishment* was translated and spread throughout Europe, it became a *tipping point* in the history of penal thinking and legal reforms. In Spain, some scholars have even classified the penal thinking of that time in "pre Beccaria" and "post Beccaria Spanish Enlightenment" and, of course, they don't lack their own "Spanish Beccaria", such as Manuel de Lardizabal, who was given this title as an honor for his "Speech on penalties" published in 1782, by the criminalist Quintiliano Saldaña at the beginning of the 20th century.<sup>4</sup>

<sup>1</sup> DER2010-21728-C02-02

<sup>2</sup> John G. A. Pocock, *Barbarism and Religion, vol. 1: The Enlightenments of Edward Gibbon* (Cambridge, 1999), p. 13

<sup>3</sup> Voltaire, *Dictionnaire philosophique, Œuvres complètes*, Ed. Garnier-Frères (Paris, 1879) vol.19, p. 614. Montesquieu, *De l'esprit des lois*, Ed. Garnier (Paris, 1777), Livre VI, Chap. XVI, p. 186. On the full meaning for legal history of those words by Voltaire, see Carlos Garriga, "Orden jurídico e independencia política: Nueva España, 1808 - Mexico, 1821", in *La revolución novohispana, 1808-1821*, edited by Antonio Annino, Fondo de Cultura Económica (Mexico, 2010), pp.35-124, p.42

<sup>4</sup> Luis Pietro Sanchís, "La Filosofía Penal en la Ilustración Española", in *Homenaje al Dr. Marino Barbero Santos in memoriam* (Cuenca, 2001), p. 489-10. Jerónimo Betegón, "Lardizábal: "Discurso Sobre Las Penas" (Nota Con Motivo de su reedición)", *Anuario de Derechos Humanos*, vol. 3, Edit. Universidad Complutense (Madrid, 1985), p.

This is not the place to discuss the merits of Beccaria and the influence of other enlightened publicists on the penal thinking of their time. Still, it is necessary to recall that the classic narrative provided by legal historians was, for a long time, dominated by a teleological perspective within which the transformation of penal justice was seen as part of an evolutionary process characterized by the progressive enforcement of new institutions inspired by humanitarian feelings, libertarian goals and based upon rationalist and utilitarian justifications that would have been able to defeat the cruel, harsh, and tyrannical social order held by the ancient absolute monarchies.<sup>5</sup> It would not be an exaggeration to say that it has been in the field of the history of criminal law where the effects of that sort of *whig* vision of history reached one of its most ostensible expressions.<sup>6</sup>

That classic vision of the relationship between criminal law and the Enlightenment has been the subject of criticism aimed, basically, at highlighting its naïve reading of the social and political change that took place during the “age of revolution”. Among the diverse criticism that arose in the second half of the last century of the standard Enlightenment vision, it was perhaps Foucault's book, *Discipline and punish*, published in France in 1975 that had the most influential impact on the field of criminal historical thinking. Foucault showed that besides its humanitarian face, Enlightenment philosophy encompassed a new discourse of power, which aimed to impose stricter discipline over individuals, according to the requirements of new social engineering.<sup>7</sup> From a very different perspective, a couple of years later, the legal historian John Langbein, in a controversial thesis about the history of torture, considered that the classic explanation, according to which judicial torture had been abolished in continental Europe due to the influence of the enlightened thinkers, was nothing but a “fairy tale”.<sup>8</sup> A common denominator for these critiques of the classic approach lay in the idea expressed as “The myth of the Enlightenment”.<sup>9</sup>

Still, those who have reacted to this kind of critique insist on highlighting changes, which occurred mainly in criminal matters as genuine and worthy fruits of the Enlightenment's legacy:

“Such postmodern or conservative critiques of the Enlightenment do not take into account the fruits of this movement, e.g. its contributions to the abolishment of torture, the deterrence of violent religious outbursts, the ending of the Inquisition, the prohibition of witch hunts and the move

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669-82. Manuel de Lardizábal y Uribe, *Discurso sobre las penas contrabido a las leyes criminales de España, para facilitar su reforma*, (Madrid, Joachin Ibarra 1782)

<sup>5</sup> This approach is present in good extent in the most influential book in Spanish language concerned with the legal history of precontemporary criminal law, Francisco Tomás y Valiente, *El derecho penal de la Monarquía Absoluta* (Madrid, 1969)

<sup>6</sup> For a recent example of this kind of legal history in Spain, see Juan Sainz Guerra, *La Evolución del Derecho Penal en España* (Jaen, 2004)

<sup>7</sup> Michel Foucault, *Discipline and Punish. The Birth of Prison* (New York, 1979)

<sup>8</sup> John H. Langbein, *Torture and the law of proof. Europe and England in the Ancien Régime* (Chicago-London, 1977), p. 10-12. Even admitting the arguments exposed by Langbein, some legal historians still consider that it was necessary the *coupe de force* provided by enlightened writers to get the abolishment of judicial torture. See Giorgia Alessi Palazzolo, *Prova Legale e Pena. La crisi del sistema tra evo medio e moderno*, (Napoli, 1979), p. 32-33

<sup>9</sup> Hans Joas, “Punishment and Respect: The Sacralization of the Person and Its Endangerment”, *Journal of Classical Sociology* 8, (2008), p. 159-77

towards more religious freedom, tolerance, and freedom of speech, all of which helped to truly civilize Europe”.<sup>10</sup>

Beyond the euro-centrism implied in the notion of a “truly civilized Europe”, the problem of this approach lies not only in the inevitable gap between a history of legal theories and a history of the practices of crime and punishment -that does not always show the effects of the former in the short and middle term-, but in the fact that, as it has been pointed out, “this method of doing history imposes serious limitations on our understanding of both the operation of pre-modern systems and the process of historical development”.<sup>11</sup>

This last statement conveys the same kind of methodological concern for the new critical legal historiography developed in continental Europe, particularly in Iberian countries and Italy, during the last decades of the 20th century. Even when the teleological perspective seems to still be dominant among legal historians, those scholars who subscribed to critical legal historiography have assumed the methodological consequences of a non-teleological approach, producing a deep change in both our comprehension of the pre-contemporary legal culture and in our perception of the institutional devices developed in the transitional period.<sup>12</sup> Now we are aware, for example, that the codification of national law in continental Europe was not just a product of rationalization or a simple matter of technical innovation but the consequence of an ideological project that implied the imposition of a new social game not necessarily concerned with achieving the goal of equality.<sup>13</sup> Similarly, the classic view, according to which the Constitution of Cadiz meant the starting point for the adoption of French-style liberalism in Spain, has been questioned by a different perspective that emphasizes its strong connection with the old legal culture and the historicist sense of its legal discourse.<sup>14</sup>

If the relationship between the Enlightenment and criminal law, provided by classic historiography, was, to a large extent, constructed upon the base of a specific characterization of the Ancient Regime now that this has changed, new questions arise. Rejecting the classic leitmotiv of an abstract and unhistorical rationality, critical legal historians have shed new light on the old legal culture and its own institutional patterns. From this new perspective, the old legal doctrine has been explored to find cultural keys and a local sense of the Ancient Regime’s institutional dynamics.<sup>15</sup>

<sup>10</sup> Ulrich L. Lehner, “Introduction. The Many Faces of the Catholic Enlightenment”, in *A Companion to the Catholic Enlightenment in Europe*, Edited by Ulrich L. Lehner & Michael Printy (Leiden-Boston, 2010), p. 10-11

<sup>11</sup> Lindsay Farmer, *Criminal law, tradition and legal order. Crime and the genius of Scots law, 1747 to the present* (Cambridge, 1997), p. 31.

<sup>12</sup> For a brief reference, Pietro Costa, “Saperi, discipline, disciplinamento: verso una ‘nuova’ storia della cultura giuridica?”, *Annali della Facoltà di Giurisprudenza. Università degli Studi di Macerata* 2 (1989), p. 993-1028. Antonio M. Hespanha, “Una nueva historia política e institucional”, *Revista Mexicana de Ciencias Políticas y Sociales*, year XLI, vol. 166, (1996), p. 9-45. Carlos Garriga, “Orden jurídico y poder político en el Antiguo Régimen”, *Historia y derecho, historia del derecho, ISTOR*, year IV, vol. 16, (spring 2004), p. 13-44

<sup>13</sup> Giovanni Tarello, *Cultura giuridica e politica del diritto* (Bologna, 1988), p. 41-67. Pío Caroni, *Saggi sulla storia della codificazione* (Milano, 1998).

<sup>14</sup> Carlos Garriga y Marta Lorente, *Cádiz, 1812. La constitución jurisdiccional* (Madrid, 2007).

<sup>15</sup> Antonio M. Hespanha, “Para uma teoria da história institucional do Antigo Regime”, in *Poder e Instituições na Europa do Antigo Regime. Colectânea de textos*, Edited by Antonio M. Hespanha (Lisboa 1984), p.7-89.

Against the emblematic image of an Absolute Monarchy with a harsh centralized criminal justice system, a more complex view of its legal culture has produced a different picture.

Among the various features of this picture, there are some, which are worth noting in order to be able to read, in context, the way in which enlightened ideas could have been assimilated or resisted by Spanish jurists in the transition from the 18<sup>th</sup> to the 19<sup>th</sup> centuries. Just to mention the most important elements, we should remark on:

- The inextricable and synergic relationship between religion (and its cultural agencies) and the law. The dominant anti-voluntarist conception of the law, which was derived from the belief in a transcendent order whose ultimate definition was to be reached in a cognitive way (academic discussions, scholarly opinions, judicial decisions etc.) rather than by legislative acts of sovereign will. The relative autonomy of the legal doctrine and judicial style and their capability to shape the institutional practices beyond positive written laws.<sup>16</sup>
- The corporative political structure and the consequent distribution of normative and judicial powers (and the phantasmagoric nature of the process of centralization).<sup>17</sup> The high value assigned by the legal doctrine to local customs. The religious imprint that made the appeal to values like mercy or compassion relevant in the judicial practice and allowed judges to moderate the penalties provided by laws, as well as the frequent use of pardons and peace deals to avoid criminal sentences.<sup>18</sup>
- The dominant factualism in the legal thinking, that is to say, the admitted possibility of deriving normative arguments, an “ought”, permission or exceptions to general laws, from factual conditions.<sup>19</sup> The casuistic and topical structure of legal reasoning, held in the conviction that the “case” was independent of the positive laws.<sup>20</sup>

Within this cultural framework, which was not generally questioned by Spanish jurists of the 18th century, some of the enlightened ideas about criminal law could have opened up a new place for discussion and for reforming projects. Yet, none of the worthy fruits attributed to the Enlightenment in the field of criminal justice were carried out in Spain, at least until the collapse of the Monarchy due to the Napoleonic invasion of 1808.

Why did Spanish jurists fail to achieve an institutional change in such a substantive matter as the administration of criminal justice? A complete answer to this question would require a deeper

<sup>16</sup> Bartolomé Clavero, *Tantas personas como estados. Por una antropología política de la historia europea*, (Madrid, 1986). Bartolomé Clavero, “Delito y Pecado. Noción y escala de transgresiones” in *Sexo barroco y otras transgresiones premodernas*, (Madrid, 1990), p. 57-89. Bartolomé Clavero, “Textos Antigos em Tempos Modernos: a Determinação das Transgressões” in *Penélope, Fazer e Desfazer a História*, 6 (1991), p. 41-46. Bartolomé Clavero, *Antídora. Antropología Católica de la Economía Moderna* (Milano, 1991).

<sup>17</sup> Antonio M. Hespanha, *Vísperas del Levantamiento: instituciones y poder político (Portugal, siglo XVIII)* (Madrid, 1989). Annik Lempériér, *Entre Dieu et le Roi, la République* (Paris, 2004)

<sup>18</sup> Antonio M. Hespanha, *La gracia del derecho. Economía de la cultura en la Edad Moderna*, (Madrid, 1993). Alejandro Agüero, *Castigar y perdonar cuando conviene a la república. La justicia penal de Córdoba del Tucumán, Siglos XVII y XVIII* (Madrid, 2008)

<sup>19</sup> While this is considered today a kind of fallacy by the dominant ethical theory, it was normally accepted in pre contemporary moral language, Alasdair MacIntyre, *After Virtue. A Study in Moral Theory* (Notre Dame, 2007)

<sup>20</sup> Víctor Tau Anzóategui, *Casuismo y sistema. Indagación histórica sobre el espíritu del Derecho Indiano*, (Buenos Aires, 1992). Theodor Viehweg, *Topics and Law: A Contribution to Basic Research in Law*, (Frankfurt am Main, 1993).

and longer analysis: the problematic relationship between Catholicism and the Enlightenment and the deterrent that the experience of the French revolution meant for the Spanish reformist, should be taken into account. However, it would exceed our purpose which is limited to showing why the Spanish legal doctrine was not able to assume all of the consequences implied in enlightened penal thinking as was exposed in Beccaria's *On crime and punishments*. Considering its circulation in Spain, we would like to identify certain discursive keys that conditioned its reading and its general acceptance among Spanish publicists and jurists of its time.

### Beccaria in Spain and the “blind spot” of Spanish legal culture

Ten years after the original Italian version of *On Crime and punishments* appeared as an anonymous book in Livorno, the first translation into Castilian was published in Spain, in 1774.<sup>21</sup> By that time, as the Spanish translator said in his prologue, praises to Beccaria's book resounded “in almost all parts of the world”.<sup>22</sup> As it has been pointed out, Beccaria was known by the members of the Spanish enlightened elite even before 1774.<sup>23</sup> From their posts at the Royal Court, they had been sponsoring a wide range of economic and social reforms, in a context ideologically dominated by “Enlightened Despotism” and known as the time of “Bourbon reformism”.<sup>24</sup> One of the prominent men of the Royal Court, Minister Campomanes, was personally involved, from both the Royal Council and the Royal Academy of History, in getting the required license for the translation of “On crime and punishment” to be printed and published.<sup>25</sup>

In spite of this auspicious beginning, as Tomás y Valiente has shown, the reception of Beccaria in Spain was “uneven and just moderately prolific in the short term”.<sup>26</sup> The translation had been preceded by academic debate on the use of judicial torture, which was not aimed at achieving its abolishment but at adjusting its use to the ancient rules.<sup>27</sup> It was followed not only by the publication of a profuse treatise by friar Fernando de Ceballos against “the false philosophy or atheism, deism,

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<sup>21</sup> On this and the subsequent Spanish translations (1820, 1821), see Rafaella Tonin, “Dei delitti e delle pene di Cesare Beccaria in spagnolo. Traduzione documento e traduzione strumento a confronto”, in *TRAlinea*, Vol. 12 (2010). URL: [http://www.intralinea.it/volumes/eng\\_more.php?id=903\\_0\\_2\\_0](http://www.intralinea.it/volumes/eng_more.php?id=903_0_2_0)

<sup>22</sup> Juan Antonio de las Casas, “Prologo del Traductor”, *Tratado de los delitos y las penas*, (Madrid, Joachin Ibarra, 1774), facsimilar edition (Madrid, 1993), p. 4

<sup>23</sup> Jean Sarrailh, *L'Espagne éclairée de la seconde moitié du XVIIIè siècle* (Paris, 1954), p. 547. Pietro Sanchís, “La Filosofía Penal en la Ilustración Española”, p. 502

<sup>24</sup> See Antonio Domínguez Ortiz, *Las claves del Despotismo Ilustrado (1715-1789)* (Barcelona, 1990). About the problematic meaning of Enlightened Despotism, Catherine B. A. Behrens, “Enlightened Despotism”, *Historical Journal*, 18, 2 (June 1975), p. 401-408. On the relationship between Enlightenment and Bourbon reformism, Agustín Guimerá (ed.) *El reformismo borbónico* (Madrid, 1996)

<sup>25</sup> Giovanna Calabro, “Beccaria e la Spagna”, In *Atti del Convegno internazionale su Cesare Beccaria*, Accademia delle scienze di Torino nel secondo centenario dell'opera *Dei delitti e delle pene*, (Torino, 1966), p. 101-20. On the proceedings required to publish a book and the especial interest in publishing legal texts in this period, Esteban Conde Naranjo, *Medioevo ilustrado. La edición erudita del Ordenamiento de Alcalá* (Sevilla, 1998)

<sup>26</sup> Francisco Tomás y Valiente, *La tortura en España* (Barcelona, 1994), p. 166

<sup>27</sup> This was the main argument exposed in a book by Alfonso María Acevedo, *De reorum absolutioe* (Madrid, 1770) which was criticized and responded in other book by Pedro de Castro, *Defensa de la tortura y leyes patrias que la establecieron: e impugnación del tratado que escribió contra ella el Doctor Alfonso María de Acevedo*, which was not published until 1778. On this debate, Tomás y Valiente, *La tortura*, p. 126-131.

materialism and other new sects convinced of the crime against the State and the Sovereigns”, but by its subsequent inclusion in the Spanish Inquisition’s *index* of prohibited books in 1777.<sup>28</sup> Even while these kinds of conservative reactions against Beccaria did not occur exclusively in Spain, they show the ideological gap between the two dominant political trends of the moment, clearly represented in the different attitudes adopted by the Royal Council, on the one hand, and by the Supreme Inquisition Council, on the other, both parts of the highest level of royal bureaucracy.<sup>29</sup>

Historians concerned with the history of penal thinking have paid more attention to those publicists and jurists enrolled in the first trend, such as the aforementioned Manuel de Lardizábal y Uribe, while they have considered responses like that of friar Fernando de Ceballos as extremely fanatical and reactionary, as certainly they were. However, if we take into account the alarmist connection that such reactionary discourse set between penal reform and the “dissolution of customs and morals”, it could be suggested that, in spite of their fanatical tenor, they hit the nail on the head. From the reactionary point of view, it may have seemed evident that the selective reading of new philosophers such as that carried out by enlightened Spaniards, could have provided fresh arguments to support the king’s jurisdiction against traditional powers like the Church. Nonetheless, at the same time, they seemed to be aware that it threatened the religious and corporative foundation of the ancient constitution in which not only the traditional source of the king’s power, but also the limits to the loyalty of his Catholic subjects, was upheld.<sup>30</sup>

Due to this sort of political aporia, it must have been hard for reformist ideology to go further, even for those that enthusiastically had assumed the challenge of interpreting and putting into action enlightened penal principles. Yet, enlightened penal ideas left their imprint on Spanish legal literature and can be traced back, as legal historians commonly do, by analyzing the debate on certain topics such as torture, the death penalty, the proportional relationship between crime and punishment, the goals of punishment, etc. The outcomes of this approach tend to highlight the moderate attitude of Spanish jurists in comparison with the more radical statements expressed by Beccaria. While they do not fall into a type of anticipatory fallacy, taking some statements out of context, they attempt to find the seeds of a new legality that was still far from being realized. To avoid this methodological risk, we would like to show here how said aporia was still operative, though perhaps as a blind spot, in the background of the legal doctrine produced during the throes of the Spanish Ancient Regime -even in the writings of those who showed sympathy to Beccaria's ideas.

<sup>28</sup> Fernando de Cevallos y Miers, *La falsa filosofía o El ateísmo, deísmo, materialismo y demás nuevas sectas convencidas de crimen de Estado contra los soberanos, y sus regalías, contra los magistrados, y potestades legítimas* (Madrid, Imp. Antonio Sancha, 1774 - Imp. Antonio Fernández, 1775-1776). On the Inquisitorial prohibition in Spain, Angel Torío, “Beccaria y la Inquisición española”, in *Annuario de Derecho Penal y Ciencias penales*, 24, (1971), p. 391-416

<sup>29</sup> On the contemporaneous reactions out of Spain, Tomás y Valiente, *La tortura*, p. 167-68. See also, on the well-known conservative reaction of Facchini, Aaron Thomas (ed.) *On crime and punishments and other writings* (Toronto, 2008), p. 89-101. Beccaria’s book had been included in the Roman Inquisition Index, in 1766. See Girolamo Imbruglia, “Illuminismo e religione. Il Dei delitti e delle pene e la difesa di Verri dinanzi alla censura inquisitoriale”, in *Studi settecenteschi*, 25–26 (2005–2006), p. 119–61. Giuseppe Orlandi, “Beccaria all’Indice”, in *Spicilegium Historicum Congregationis S.S.mi Redemptoris*, 56 (2008), p. 179-218

<sup>30</sup> No wonder that friar Fernando de Ceballos had been censured by the Royal Council and accused of “antiregalist”. See Lucienne Domergue, “Un defensor del trono y del altar acusado de crimen antirregalista : Fray Fernando de Cevallos”, in *Bulletin Hispanique*, v. 80, 3-4, (1978), p. 190-200

## Enlightenment ideology and the limits on Spanish legal culture

As we have said, it is debatable, from a critical perspective, whether the influence of Beccaria and other enlightened thinkers was decisive or not, in the achievement of the many of the fruits which legal historiography has usually attributed to the criminal field. In this regard, it could be argued that: - Judicial torture was pretty much a relic when enlightened thinkers wrote against it and that there was a huge list of critiques provided by the previous legal tradition. - Judicial torture and death penalties alike were scarcely used by common criminal courts of the 18th century.<sup>31</sup> -The humanitarian feelings that appealed for milder penalties may have had precedent expressions in the multiple forms of clemency and moderation widely practiced by the judges of the Ancient Regime and in the frequent use of peace deals and royal pardons.<sup>32</sup> -Procedural guarantees, such as *in dubio pro reo*, *non bis in idem*, the right to a legal defense and to recusal or appellate resorts, had been formulated by medieval doctrine and, as they were grounded in the theological notion of divine natural law, they worked as limits to the Prince's power.<sup>33</sup>

However, there are at least two critical points that could be regarded as a watershed in legal history and with whose enunciation enlightened ideology had a lot to do: the rationalist method and the consequent formulation of the legality principle whose most accurate expression was set in the ideal of codification.<sup>34</sup> We will focus our analysis on these two points.

a) Rationalism vs. historicism and religion. Using an abstract standard of rationality to evaluate the legal doctrine of the Ancient Regime would mean falling into the teleological perspective we wanted to avoid. However, we will use the notion of rationalism in a relative way to describe the discursive attitude of those who, like Beccaria, intended to dispense with all previous literary tradition, seeking to deductively build an argument, that they believed justified, upon certain axiomatic premises. Beyond whether he is finally able to do it or not, Beccaria expresses this attitude from the very beginning of his book, when he ridicules the centuries-old tradition whose fundamental texts and analytical techniques were still the main tools for argumentation among the Spanish jurists of the time:

<sup>31</sup> Langbein, *Torture*, p. 64-69; Tomás y Valiente, *La tortura*, p. 170; Alejandro Agüero, "La Tortura Judicial en el Antiguo Régimen. Orden procesal y cultura", *Dereito e Democracia*, vol. 5, 1, (2004), p. 187-221

<sup>32</sup> On the issue of pardons, and its social function in the aristocratic rule in England, Douglas Hay, "Property, Authority and the Criminal law", in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, ed. by D. Hay, Peter Linebaugh, John G Rule, E. P. Thompson and Cal Winslow (London, 1976). See also the critical review by John Langbein, *Albion's Fatal Flaws, Past and Present*, 98 (1982), p. 96-120. From a different perspective, for Iberian ancient law, María I. Rodríguez Flores, *El perdón real en Castilla (Siglos XIII-XVIII)*, Salamanca, 1971. Hespanha, *La gracia del derecho*, p. 203-73, and the critique of Enrique Gacto, "Aproximación a la historia del derecho penal español" in *Hispania, entre derechos propios y derechos nacionales* (Milano 1990), v.1, pp. 501-29. For the colonial horizon, Agüero, *Castigar y perdonar*, p. 145-65.

<sup>33</sup> Gino Gorla, "Iura naturalia sunt immutabilia. I limiti al potere del 'Principe' nella dottrina e nella giurisprudenza forense fra i secoli XVI e XVIII", in *Diritto e potere nella storia europea. Atti (in onore di Bruno Paradisi) del Quarto Congresso Internazionale della Società Italiana di Storia del Diritto*, (Firenze, 1982), vol. II, p. 629-84. Antoine Astaing, *Droits et garanties de l'accusé dans le procès criminel d'Ancien Régime, XVIIe et XVIIIe siècles: Audace et pusillanimité de la doctrine pénale française*, (Aix en Provence, 1999). For the late Spanish doctrine, María Paz Alonso Romero, *Orden procesal y garantías entre Antiguo Régimen y constitucionalismo gaditano*, (Madrid, 2008)

<sup>34</sup> Bartolomé Clavero, "La idea de código en la Ilustración jurídica", *Historia, Instituciones, Documentos*, 6 (1979), p. 48-88. Pietro Costa, "Pagina Introduttiva (Il principio di legalità: un campo di tensione nella modernità penale)", *Quaderni Fiorentini*, 36 (2007), v. I, pp. 1- 45.



“A few odd remnants of the laws of an ancient conquering race codified twelve hundred years ago by a prince ruling at Constantinople, and since jumbled together with the customs of the Lombards and bundled up in the rambling volumes of obscure academic interpreters – this is what makes up the tradition of opinions that passes for law across a large portion of Europe.”<sup>35</sup> Jurists of great academic authority on *Ius Commune*, such as Crapzovio, Claro and Farinaccio, are immediately depicted as examples of those “obscure interpreters” whose opinions were “obeyed as laws” by the judges. 20

Beyond the critique of the penal justice system, this starting point announced a deeper argument, with constitutional implications, against a whole legal tradition in which the very concept of law had not yet been identified with a set of positive laws but with a transcendent order gradually revealed by an interpretative activity that relied, ultimately, on theological and legal academic authorities. As the *Ius Commune* tradition had grown as a cultural complex in which both spiritual and secular powers had found their common legitimacy (in which Canon law was the soul and Roman law was the body), it was impossible to untie those elements from each other without killing the creature, that is to say, without separating its soul from its body.<sup>36</sup> That is exactly what Beccaria, following the path of naturalist rationalism, was claiming, though not by denying the existence of sources of natural or divine law (something that may have sounded extremely imprudent in a man who was under inquisitorial suspicion) but by stressing the autonomy of the political legal field on the grounds of contractualist theories on the origin of society and on the variability of social conditions opposed to the absolute constant features of both, divine and natural law.<sup>37</sup> 21

If it is true that in Spain, by the middle of the 18<sup>th</sup> century, an anti-Romanist movement was attempting to reduce the heavy Roman-Canon legacy in the definition of national law (*Derecho Patrio*) and in the education of lawyers, it is also true that the dominant trend could not put aside the basic notion of law as a transcendent order in which religion and, particularly, history still had a meaningful place.<sup>38</sup> As Clavero has shown, beyond religious boundaries, the problem for Hispanic jurists was that of the new “scientific method” that encouraged projects embracing a new concept of law on the grounds of axiomatic and mathematical reasoning that did not fit with the complex social structure of privileges that Spanish jurists were not willing to criticize.<sup>39</sup> 22

Halfway between the natural rationalist approach and the position of the considerable number of staunch defenders of the scholastic tradition, some Spanish enlightened jurists tried to find their way out by both, harmonizing natural rationalist ideas with the Thomistic Aristotelian organic concept 23

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<sup>35</sup> Beccaria, *On crimes and punishments*, p. 3 The quotations are taken from Beccaria, *On crimes and punishments and other writings*, ed. by Richard Bellamy, (Cambridge, 2000)

<sup>36</sup> On the metaphoric relationship between Cannon Law and Roman Law, Bartolomé Clavero, *Historia del Derecho Común* (Salamanca, 2005)

<sup>37</sup> Beccaria, *On crimes*, p. 4-5

<sup>38</sup> Bartolomé Clavero, “‘Leyes de la China’: orígenes y ficciones de una historia del derecho español”, *Anuario de Historia del Derecho Español*, 52 (1982), p. 193-221. Jesús Vallejo, “De sagrado arcano a constitución esencial. Identificación histórica del derecho patrio” in *Los Borbones. Dinastía y memoria de la nación en la España del siglo XVIII* (Madrid, 2001), p. 423-84

<sup>39</sup> Clavero, “La idea de código” p. 68-69.

of the social corps, and by adopting new signifiers (as was the concept of *Derecho Patrio* and the very notion of “Code”) to describe the old set of doctrine and norms historically enforced. Whether this last outlook was a consequence of “ignorance or of a more complex political astuteness” as Clavero has said, it is evident that as the enlightened claims for a new system of law embodied in a simple, clear and normative (not of doctrine) legal code arose, Spanish jurists began to identify their national positive law (*Derecho Patrio*) in the legal texts passed by the Castilian monarchs from medieval times, while a legal body from the 13th century which was full of *Ius Commune* doctrines (*Las Siete Partidas*) became a model of “legal code”.<sup>40</sup> Under this lexical shift on the level of signifiers, lay a widespread positive concept about the Spanish historical law that jurists used to underline when comparing it to other nation’s legal orders.

This positive attitude towards Spanish historical law can be seen in the piece of work that has been considered the most accurate expression of the enlightened penal reformism in Spain, that is to say, the “*Discurso sobre las penas*” (1782), by Manuel de Lardizabal y Uribe. If at first sight it seems that Lardizábal is going to develop a legal speech adopting the naturalist rationalism thinking, when he appeals to the “Code of Nature” as the “source and origin of all legislation”, he immediately makes it clear that he has tried to apply the “new maxims and principles to the current criminal laws”, pointing out those which deserved to be reformed and supporting, at the same time, the new maxims and principles “on the authority of said laws”, in order to show “the truth” of what he has previously said: that “among all criminal legislations in Europe that have not been reformed yet there is none less defective than the ours”. Even more, he adds that it would not be hard to show that “some maxims that today are adopted as useful and new, are approved and enshrined from immemorial times in our homeland laws”.<sup>41</sup>

In this sort of hermeneutic syncretism, in which medieval texts are called to give sense to new principles, the outcome cannot be anything but a change at the enunciation level, leaving untouched ancient legal semantics. One might think that the historicist imprint was strategically used to get the Royal Court’s support, or at least to avoid its apprehension. Lardizábal recognizes that many ancient laws have become obsolete while others that had been necessary in the past seemed to be too harsh and unsuitable for the new times.<sup>42</sup> Still, he thinks that those ancient laws “do not deserve, properly speaking, the mark of cruel” because such severity was required by the circumstances of former times.<sup>43</sup> This could have brought his thinking closer to Beccaria’s starting point. However, the practical implications of his historicist approach traverse the entire speech and it becomes, of course, a matter of “method”. To undertake a reform, says Lardizábal, that “should not be voluntarist and capricious”, it is imperative to have in mind “all the penalties that in diverse times had

<sup>40</sup> Clavero, “La idea de código”, p. 72-73

<sup>41</sup> Lardizábal, *Discurso*, Prologue, p. XII-XIII (English translations from Spanish authors quoted are ours).

<sup>42</sup> The same argument will be used decades later by Martínez Marina to criticize the latest legal compilation of the Spanish Monarchy (passed in 1805), although his thinking was still far from the new paradigm of codification. Francisco Martínez Marina, *Juicio crítico de la Novísima Recopilación* (Madrid, Francisco Villapando, 1820)

<sup>43</sup> Lardizábal, *Discurso*, p. 12

been imposed for crimes”.<sup>44</sup> Thus the main difference between Beccaria and his Spanish emulous was in the method and not, as it has been suggested, in the goals of their respective discourses.<sup>45</sup> Beccaria's method leads to codification, although he does not expressly refer to it. The historical approach of Lardizabal, however, can only lead, at best, to a compilation, although he speaks in terms of codification.<sup>46</sup> Due to his historicist approach, reducing the law to one single code was completely out of his frame of possibilities; it was in his blind spot.

We shall show, in the next topic, how this different methodological setting implied consequential divergences on sensitive issues such as the way in which the interpretative function of judges was described. Let us just add here that the historicist approach, if not a necessary consequence of, was at least in close connection with, the ultimate religious foundation of the Spanish legal culture. If in Beccaria Sovereigns had the power to enact and interpret the law because they had received the “tacit or express oath” from “the united will of the subjects” and as they were “the repository of the current will of all”, in Lardizabal, “as it is explained by the Wise King D. Alonso” (enactor of *Las Siete Partidas*), the Kings had received their “Lordship” from God, who entrusted it to them, “*for justice was kept by them*”.<sup>47</sup> Beyond the distinct source of legitimacy (the united will, in one case, God, in the other) and the different paradigm of ruling (one law-centered, the other justice-centered), the religious foundations of the Spanish legal culture had a sociological dimension that Hispanic jurists underlined when they explained the good virtue of their own historical laws.

When we mention the synergic relationship between religion and law, we do not just mean the well-known trait from the origin of the Western legal tradition.<sup>48</sup> Rather we want to stress the features of a cultural framework in which religion and law made up a single textual field from which it was possible to derive normative arguments to be used in a secular court.<sup>49</sup> For the legal doctrine of the early modern centuries, secular criminal justice was seen as a subsidiary measure to punish those who “abandoned by the spiritual doctors” did not want to make amends.<sup>50</sup> The widespread confidence in the disciplinary powers of catholic socialization was in the background of

<sup>44</sup> Lardizabal, *Discurso*, p. 17

<sup>45</sup> Jesús Astigarraga and Javier Usoz, “Del A. Genovesi napolitano de Carlo di Borbone al A. Genovesi español de Carlos III: la traducción española de las *Lezioni di commercio* de V. de Villava”, *Cuadernos de Historia del Derecho*, 15 (2008), p. 293-326, p. 309, where it is pointed out that while Lardizabal's speech was addressed to the codification, Beccaria's discourse was aimed at denouncing the current legislation, along with the more moderate attitude of the former.

<sup>46</sup> On the substantive difference between the meaning of “code” or “codification” and the traditional technique of “compilation”, and the debates around this issue in Spain, see Clavero, “La idea de código”, p. 81-82

<sup>47</sup> Beccaria, *On crimes*, p. 14. Lardizabal, *Discurso*, p. 2-3 (italics in the original). See also p. 24

<sup>48</sup> Harold J. Berman, *Law and revolution: the formation of the Western Legal Tradition* (Cambridge-London, 1983). Paolo Prodi, *Una historia de la justicia. De la pluralidad de fueros al dualismo moderno entre conciencia y derecho* (Buenos Aires, 2008)

<sup>49</sup> Clavero, “Delito y pecado”, p. 60-61. Examples can be seen in Alejandro Agüero, “Las penas impuestas por el Divino y Supremo Juez’. Religión y justicia secular en Córdoba del Tucumán, siglos XVII y XVIII”, *Jahrbuch für Geschichte Lateinamerikas*, 46, (2009), pp. 203-30.

<sup>50</sup> Jerónimo Castillo de Bobadilla, *Política para corregidores y señores de vasallos, en tiempo de paz, y de guerra* [1597] (Madrid, Joachin Ibarra, 1759), v. I, p. 277

this image.<sup>51</sup> Despite the regalists' doctrines and secularization policies that took place during the 18<sup>th</sup> century, the close connection between religious discipline and criminal law had not disappeared from the legal language and it was determinant for the positive concept of historical law. As a jurist enrolled in the innovative "institutionalist" stream, at the beginning of the 19<sup>th</sup>, said: "there is no need for harsh penalties in Spain where a religion like ours rules and is professed, which provides an infinite number of crimes and makes men docile and obedient to the precepts".<sup>52</sup>

It would not be fair not to mention the discursive efforts deployed by Lardizábal to underline the necessary distinction that must be established in criminal matters between sins and crimes. Following traditional theology, he asserts that not every sin is a crime, as the latter requires an external action that may cause damage on individual security or disturb the public peace. Anyhow, he makes it clear that he is far from excluding from the concept of crime, the external actions that perturb religion, when he states that religion is "the strongest link and the most solid foundation of society".<sup>53</sup> In this regard, he previously set crimes against religion in the first category within his classification of all possible crimes: "All crimes that can be committed are reduced to four classes: against religion, against customs, against tranquility and against public or private security".<sup>54</sup> The classification itself is quite expressive about the traditional social values that guided his thinking. In the first class, he did not include crimes that perturb worship, which belonged to the third or fourth category. Religion, therefore, was doubly protected. Moreover, even when he asserts that crimes against religion should be punished by means of religious penalties, he admits that in cases of serious religious crimes, such as sacrilege, those penalties would not be enough to prevent the crime, making it necessary to use secular penalties.<sup>55</sup> This was coherent, in a legal mind in which positive human laws were called to ensure previous normative fields like customs and religion while these were still the main sources of legitimacy for the royal power. Under the discursive surface of secular law, the deep semantic link between law and religion was still operative.

b) Law vs. *Justice*: "When a fixed code of laws, which must be followed to the letter, leaves the judge no role other than that of enquiring into citizens' actions and judging whether they conform or not to the written law, and when the standards of just and unjust, which ought to guide the actions of the ignorant citizen as much as those of the philosopher, are not a matter of debate but of fact, then the subjects are not exposed to the petty tyrannies of the many individuals enforcing the law...".<sup>56</sup>

<sup>51</sup> An example taken from the colonial laws can help us to understand the full implication of what we are saying. In 1776 the Crown sent a royal letter to order to the clergy of the Indies that, from pulpits and confessionals, should be banished the "mistake" of believing that "smuggling is not a sin". The royal text urged religious authorities to convey to subjects the certainty that those who committed smuggling were unfaithful to the King and not only broke the human laws "but also the commandments of God...". Juan Joseph Matraya y Ricci, *Catálogo cronológico de Pragmáticas, Cédulas, Decretos, Ordenes y Resoluciones Reales [1819]* (Buenos Aires, 1978), p.357

<sup>52</sup> Ramón Lázaron Dou y de Bassols, *Instituciones de Derecho Público de España* (Madrid, Benito García y Cía., 1800), III, p. 37

<sup>53</sup> Lardizábal, *Discurso*, p. 94-98; the quoted expression in p. 98

<sup>54</sup> Lardizábal, *Discurso*, p. 36.

<sup>55</sup> Lardizábal, *Discurso*, p. 39

<sup>56</sup> Beccaria, *On crimes*, p. 15

In these few words, Beccaria summarized much of the essential elements of the legal project of enlightened liberalism. He stressed here not only the ideal of reducing the law to a set of positive and codified laws but also that of reducing the “standards of just and unjust” to a “matter of fact”, while the judges’ role was demoted to produce a “perfect syllogism” in which “the major premise should be the general law; the minor, the conformity or otherwise of the action with the law; and the conclusion, freedom or punishment”.<sup>57</sup> Within this well-known scheme, the long tradition that had built the institutional order upon the grounds of a mysterious ontological conception of justice was completely dismissed. “We must be careful” – Beccaria had previously said – “not to attach any notion of something real to this word ‘justice’, such as a physical force or an actual entity”.<sup>58</sup> This was the way in which the autonomy of the legal field could be achieved. **30**

Beccaria stressed, in this way, the artificial nature of civil society and its legal order distancing himself from the more moderate enlightened thinkers such as Montesquieu: “Nothing is more dangerous than the popular saw that we ought to consult the spirit of the law”.<sup>59</sup> There is no place for interpretation other than that of the legislator who, representing the general will is called to do so by emending “the wording of the law”. The displacement of power from the “interpreters” to the “legislator”, from the hermeneutic task of justice to the literal observance of the law, is finally complete with the exclusion of the grace: “To show men that crimes can be pardoned, encourages the illusion of impunity and induces the belief that, since there are pardons, those sentences which are not pardoned are violent acts of force rather than the products of justice”.<sup>60</sup> **31**

The cultural and ideological premises and the political implications of this new legal approach have long been studied.<sup>61</sup> It is not a case of going further here, but of showing how some of these premises and implications could have conditioned reformist penal thinking among Spanish jurists. The goal of reducing the law to a simple code and appeals for the literal observance of the positive laws became leitmotifs among enlightened Spanish thinkers of the 18th century.<sup>62</sup> In that context, critiques arose of the current law and doctrine, though generally not the medieval *Siete Partidas*. Meléndez Valdés, perhaps the most expressive, in this sense, said in 1791, that the Spanish laws were like “an arsenal where everyone finds the weapons adjusted to his desires and claims”, when he appealed for a new “Spanish Criminal Code”.<sup>63</sup> **32**

Lardizábal, in the same way, had pointed out that “there is no punishment without law”, something that has been used by scholars to say that he adhered unreservedly to the “legality” **33**

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<sup>57</sup> Beccaria, *On crimes*, p. 14

<sup>58</sup> Beccaria, *On crimes*, p. 11

<sup>59</sup> Beccaria, *On crimes*, p. 14.

<sup>60</sup> Beccaria, *On crimes*, p. 111

<sup>61</sup> For the continental legal history perspective, Pietro Costa, *Il Progetto Giuridico. Ricerche sulla giurisprudenza del liberalismo classico*, (Milano, 1974); Giovanni Tarello, *Storia della cultura giuridica moderna. Assolutismo e codificazione del diritto*, (Bologna, 1976).

<sup>62</sup> Clavero, “La idea de código”, p. 65-68

<sup>63</sup> Juan Meléndez Valdés, *Discursos Forenses* (Madrid, Imprenta Nacional, 1821), p. 261

principle”.<sup>64</sup> It is true that he was concerned with the need to reduce uncertainty, resulting from the obscurity of ancient laws, while insisting on the literal observance of those that were clearly expressed. Still, he disagrees with Beccaria on the topic of consulting the “spirit of the law”, which in his view “is not so dangerous” if it is not understood as voluntarist judicial discretion.<sup>65</sup> What may be seen as a subtle divergence, however, hides a great gap in the very concept of law. Unlike the rationalist approach, the casuistic mind leads Lardizábal to admit that prudent judicial discretion is often necessary in order to apply the law to certain cases given that laws cannot be made in a way that “can comprehend all cases that may occur” and “being conformed to the mind of the legislator, are not literally expressed in his words”<sup>66</sup>. Behind the casuistic mentality lies a deep and long-lasting belief in a normative ontologism that, ultimately, determines the reasonability of judicial discretion. No wonder that, in support of his point of view, Lardizábal invokes a statement from Las Siete Partidas that allowed for the analogical application of the laws to unforeseen cases, and also a current Royal Act that instructed judges to apply the death penalty when it corresponded to crimes, according to the “literal expression or *equivalence of reason* of the penal laws”.<sup>67</sup>

The confidence in prudent judicial discretion derived from the casuistic approach was a persistent feature of Spanish legal culture, despite the discursive attempts to condemn and reduce the historically preeminent function of *arbitrium iudicis*.<sup>68</sup> It, in turn, was a consequence of a cultural framework in which the “standards of just and unjust” could not have been reduced to a mere “matter of fact”. Far from the utilitarian individualism that led Beccaria to assert that the laws “ought to be inexorable and so should their executors in particular cases” (as the “interest of all ought to be the product of the interests of each”) we can see how Lardizábal’s speech is still conditioned by standards derived from an organic conception of the general welfare.<sup>69</sup> This is evident when he considers the “extrinsic causes” (that is to say, not linked to the nature of the crimes) that cause “the reasons of general laws... to cease” in some particular cases, allowing a moderation or a remission of the punishment. The first example given by Lardizábal reflects the persistence of the feudal logic of exchanging services for privileges: if someone who has done great services to the republic commits a crime, his punishment could be “justly moderated or remitted”. In the same way, he still finds reasonable the medieval economy of punishments according to which if a crime was committed by many people, though all should be equally punished, “prudence and the welfare” require that in such cases only a few be punished, as the “fear” reaches all of them.<sup>70</sup>

<sup>64</sup> Lardizábal, *Discurso*, p. 20. Ignacio Serrano Butrageño, *Discurso sobre las penas por Manuel de Lardizábal y Uribe*, (Granada, 1997), Introducción, p. XIX.

<sup>65</sup> Lardizábal, *Discurso*, p. 76-77

<sup>66</sup> Lardizábal, *Discurso*, p. 75

<sup>67</sup> Lardizábal, *Discurso*, p. 79 (italics in the original)

<sup>68</sup> On the traditional role of the *arbitrium iudicis*, see Massimo Meccarelli, *Arbitrium. Un aspetto sistematico degli ordinamenti giuridici in età di diritto comune* (Milano, 1998)

<sup>69</sup> Beccaria, *On crimes*, p. 112

<sup>70</sup> Lardizábal, *Discurso*, p. 151

In the long disquisitions devoted to the circumstances that must be considered to aggravate or reduce penalties, Lardizabal follows, almost literally, the criteria contained in a law from the Siete Partidas (Law 8, Title 31, Partida 7). These criteria constituted a strong obstacle to the process of abstraction required to conceive the law as a closed order of general rules. His argument revolves over and over again around rules and exceptions that make it impossible to conceive a principle of legality not dependent on the interpretive activity of judges. How could the law be reduced to a simple code and the interpretative function of judges annulled if, in imposing the penalties, aggravating or moderating them, the time, place, recidivism, way and instruments used to commit the crime, personal qualities of both the criminal and offended must be considered?<sup>71</sup>

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It was through abstraction that Enlightenment thinkers were able to conceive the law as a set of general rules equally applicable to everyone. The main expression of this abstraction was set in the notion of an equal subject deprived of the subjective predicates on which the hierarchical conception of society was upheld.<sup>72</sup> At this point, Lardizabal was unable to assume the consequences of that key element on a new notion of legality. While Beccaria devoted a chapter to argue that the law must be equally applied to all citizens, Lardizabal, using words taken from Las Siete Partidas, states that “the quality and diversity of the people should influence the diversity of penalties”, concluding that “a nobleman should not be punished with the same kind of penalty as a commoner.”<sup>73</sup> The historical approach and its casuistic setting fit better with a legal culture grounded on religion and sensitive to the social hierarchies and to the wide variety of corporative self-governments and particular regional laws (*fueros*) spread throughout the imperial context.<sup>74</sup>

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Despite the frequent appeals for the literal obedience of positive laws, certain reasons existed beyond human laws, to determine the standards of just and unjust, that reformists were not willing to discuss. Religion, divine and natural law, and even local customs, opened the door for hermeneutic activity that could and still needed to be fulfilled through particular legislative acts, judicial decisions and scholarly opinions. If these traditional traits are perceptible in the reformists’ thinking, they are more evident in the writings of those jurists who described the current judicial praxis. For them, justice was not designed as a branch for applying positive rules but as a device of government aimed at preserving the natural and social order (which was also considered part of the natural order). For these reasons, judges were expected to be learned not only in positive royal laws but also in natural and divine law, and in the customs, humor and leanings of the subjects in the areas where they had to carry out justice.<sup>75</sup> From this point of view, legislation and justice were an expression of the

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<sup>71</sup> Lardizábal, *Discurso*, p. 139

<sup>72</sup> Tarello, *Cultura giuridica*, p. 52-55

<sup>73</sup> Beccaria, *On crimes*, chap. 21, p. 51-52. Lardizábal, *Discurso*, p. 144

<sup>74</sup> On imperial context and legal culture, see Lauren Benton, *Law and colonial cultures. Legal regimes in World History, 1400-1900* (Cambridge, 2002), p. 80-126.

<sup>75</sup> Dou y de Bassols, *Instituciones*, II, p. 21

same jurisdictional power, and as such, they were constrained by the same transcendent limits.<sup>76</sup> As a legal manual of 1785, aimed at the instruction of local judges, stated in defining justice:

“(Just) As God our Lord is the beginning, middle and end of all things, so is He also infinitely good, wise and just, and in the Holy Scripture He is called Fount and Sun of Justice. For this reason our Spanish Code of Las Partidas states that after God in his great wisdom made all things, He maintained each one in its state, therein showing His great goodness and Justice, and how those who are appointed to ‘do so on earth’ must uphold it”.<sup>77</sup>

On the cusp of the 18<sup>th</sup> century, the jurisdictional matrix, grounded in medieval tradition, resisted the displacement of power that lay behind radical reformist discourse. The proper administration of justice relied not so much on having good laws but on having good judges that had to consider their judgment “not as that of men, but of God, who had given power to the kings and from these to every magistrate”.<sup>78</sup> Under the reformers’ discourse, the justice-centered paradigm was still the key for an institutional order that, as it has been said, was a rule of judges, not of laws.<sup>79</sup> It is in this field, rather than in particular topics like torture, the death penalty, etc., where the deeper divergences between Beccaria and the Spanish reformers must be sought. Was the constitutional process that emerged after the imperial crisis able to close this gap?

## Gaditan Constitutionalism and Criminal Law Codification

Historians claim that one of the goals of 1812 constitutionalism was to reform the criminal law system. In actuality, the Cortes [Parliament], gathered under the first Gaditan charter, adopted legislation of an enlightened nature, laying down the foundation for a profound transformation of the ‘archaic’ criminal law of the Catholic Monarchy.<sup>80</sup>

Few scholars refrain from documenting this theory by referring to the origins, which they usually identify with the adoption of one of the best-known measures of the Courts: Decree LXI of 22 April 1811, by virtue of which ‘the abolition of judicial torture and physical pressures [apremios] and other corporal punishments’ was sanctioned. This measure was promoted by Agustín de Argüelles, who requested that the Plenary approve the abolition of both judicial torture and slave trade.<sup>81</sup> Beyond the symbolic value of the famous Decree, the truth is that by 1811 judicial torture was neither held in esteem by the public nor used by judges.<sup>82</sup> Moreover, since the abolition of torment had already

<sup>76</sup> Jesús Vallejo, *Ruda equidad, ley consumada. Concepción de la potestad normativa (1250-1350)* (Madrid 1992). Hespanha, *La gracia del derecho*, p. 61-84. Luca Mannori, “Giustizia e amministrazione tra antico e nuovo regime” in *Magistrati e potere nella storia europea* (Bologna, 1997) p. 39-65.

<sup>77</sup> Lorenzo Guardiola y Sáez, *El corregidor perfecto* (Madrid, Alfonso López, 1785), p. 1-2

<sup>78</sup> Dou y de Bassols, *Instituciones*, II, p. 6-7

<sup>79</sup> Marta Lorente (ed.), *De justicia de jueces a justicia de leyes. Hacia la España de 1870*, (Madrid, 2007)

<sup>80</sup> Luis Rodríguez Ennes, “La lucha contra el arcaísmo punitivo de finales del Antiguo Régimen”, *Revista de Estudios Histórico Jurídicos*, XXXII (Valparaíso, Chile, 2010), pp. 233-348.

<sup>81</sup> *Diario de Sesiones de las Cortes Generales y Extraordinarias* (=DSCGE), sitting of 2 April 1811 (we use the electronic version of the text available in <http://bib.cervantesvirtual.com>).

<sup>82</sup> Francisco Tomás y Valiente, “La última etapa y la abolición de la tortura judicial en España”, *Anales de la Facultad de Derecho*, 1 (1963), pp. 23-60.



been addressed by the Legislation Board [Junta de Legislación] of the Junta Central, it can be argued that Decree LIX had been ‘pre-cooked’ when it was submitted to the Assembly that approved it unanimously.<sup>83</sup> However, it is fair to acknowledge that the General and Extraordinary Cortes also abolished the so-called ‘apremios’ [physical pressures] extending thus the scope of torture to ill conditions suffered by prisoners, although ‘spiritual’ pressures remained excluded.<sup>84</sup> The proscription of torture and physical pressures was subsequently transformed into a constitutional article (art. 303).

We will not dwell on the better-known details, but just on certain aspects which, scarcely addressed or completely ignored by historiography, question nevertheless the standard account of the influence exerted by authors such as Beccaria on the reforms of the criminal law system carried out by the Cortes under the 1812 Constitution.

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### The Ancient Legislation and its Reforms

In the course of the consideration of the text of the draft on the abolition of torture, the Conservative Cortes member Dou y Bassols stated: ‘I accept the substance of the law, *all the more so since it is more in compliance with the laws of my country [Catalonia]*’.<sup>85</sup> Contrariwise, Argüelles sustained that ‘the terms of the law or draft text actually *abolish all laws referring to torment*’.<sup>86</sup> Note that these interventions correspond to two radically different constitutional approaches, for the former identified the Cortes’ work with a reform of the old laws of the Monarchy, whereas the latter made it clear that the Assembly could and should repeal History.

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Nowadays the reader tends to forget interventions like Dou’s, focusing only on discourses such as Argüelles’. There is hardly room for doubt, however, that Gaditan constitutionalism based its legitimacy on the historicist terms used by the Conservative Dou and not in the anti-historical ones invoked by Argüelles during the above-mentioned debate. While this question divides historiography, it is worth pointing out that the historicist grounding of Gaditan constitutionalism was included in the Preamble [*Discurso Preliminar*] of the 1812 Constitution.<sup>87</sup> That said, we shall endeavor here to determine to what extent Beccaria’s criticism of the legal order was subscribed to by a Parliament that regarded itself as a reformer of the old laws of the Monarchy.<sup>88</sup>

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<sup>83</sup> *Actas de la Junta de Legislación (Octubre 1809-Enero 1810)* (we use the electronic version of the text available in: <http://bib.cervantesvirtual.com/servlet/SirveObras/01593630013496031870035/ima0563.htm>).

<sup>84</sup> DGCGE, sitting of 2 April 1811 (García Herreros)

<sup>85</sup> DSCGE, sitting of 2 April 1811 (our italics).

<sup>86</sup> Ibid (our italics).

<sup>87</sup> Francisco Tomás y Valiente, “Génesis de la Constitución de 1812. De muchas leyes fundamentales a una sola Constitución”, in *Obras Completas* (Madrid, 1997), V, pp. 4499-4557. Marco Bellingeri, “De una Constitución otra: conflicto de jurisdicciones y dispersión de poderes en Yucatán (1781-1831)”, in Antonio Annino, Raymond Buve (coords.), *El liberalismo en México* (Münster/Hamburg, 1993), pp. 49-77. Beatriz Rojas, “Las ciudades hispanas ante la crisis: entre la antigua y nueva Constitución”, in *Historia mexicana*, LVIII, n° 1 (July-September 2008), pp. 287-324.

<sup>88</sup> Paz Alonso Romero, *Orden procesal y garantías entre Antiguo Régimen y constitucionalismo gaditano* (Madrid, 2008).

When analyzing the *reform of the under-constitutional legislation*, historiography tends to refer to another famous provision: ‘The civil and criminal Codes and the commercial one will be the same for the entire Monarchy, notwithstanding the variations that the Cortes may introduce due to particular circumstances’ (art. 258). According to the more traditional interpretation, this article demonstrates that one of the main items in the political program of the General and Extraordinary Cortes was the harmonization of law, which, in turn, meant implementing the principle of legality. Undoubtedly, the Cortes opted for codification from the beginning. However, one may ask, in view of the famous article, how to interpret the additional clause authorizing the Cortes to ‘take into account the circumstances’ in order to adapt the rules that aspired to be unique for the entire Monarchy. The issue remains as mysterious for the modern historian as it was incomprehensible for some in those days. To put it in the words of the Cortes member Gordo: ‘only the uniformity of laws can ensure that the codes are identical (...) because if in each of these codes there must be as many laws on the same matter as territories, the content of the first part in this article is rendered useless (...)’.<sup>89</sup> Despite their soundness, such arguments did not convince the Cortes, which subscribed to explanations such as the following: ‘(...) since, due to particular circumstances, a nation on the Peninsula or abroad may demand a statute for its own wellbeing, some kind of variation is considered to be necessary’.<sup>90</sup>

It is precisely in this *open* constitutional framework where both Dou’s *historicist* and Argüelles *anti-historical* stances become meaningful, although what needs to be emphasized is not so much the coexistence but rather the respective weight of both discourses. In this connection, it should be noted that Carlos Garriga has thoroughly proven that the fundamental trait of 1812 normative work was the scant recourse to repealing historical legislation, with the result that the main body thereof remained in force. Provisions such as Decree LIX were indeed exceptional, a fact which demonstrates that the winner in the dispute between historicism and anti-historicism was the Conservative Dou, not the Liberal Argüelles.<sup>91</sup> Note that the issue of repeal cannot be considered a mere question of legal technique, since this *behavior* of the General and Extraordinary Cortes entailed not only legitimizing the validity of the historical normative heritage, but also maintaining the logic of normative accumulation that characterized the legal system of the Catholic Monarchy.

The revival of the concept of *derogatio*, which had already been criticized by many authors in the XVIII century, was a decision that the Cortes took consciously for most of its members were perfectly aware of the judicial practices, which affected equally each and every professional in courts of law. Such practices, based on a jurisprudential understanding of the legal order, constituted the opposite to the principle of legality since, to quote the words of a Cortes member: ‘Arbitrary intelligence derives from glosses, which seem to have been the most ancient way of interpreting law; others take it from special treatise authors, or from various resolutions or decisions on controversies

<sup>89</sup> Fernando Martínez Pérez (ed.), *Constitution en Cortes. El debate constituyente (1811-1812)* (Madrid, 2011), p. 752.

<sup>90</sup> Ibid. p. 753 (Luján).

<sup>91</sup> Carlos Garriga, “Constitution política y orden jurídico en España: el efecto derogatorio de la Constitución de Cádiz”, in Manuel Chust (coord.), *Doceañismos, constituciones e independencias. La Constitución de 1812 y América* (Madrid, 2006), pp. 33-77.

over practices, or from replies of public authors, or additioners, or even foreign writers; and hence their varied and conflicting doctrines, without seeking the fair, reasonable and precise law for the case'.<sup>92</sup> Doctrines versus laws, judicial discretion versus the legality principle: solving such dilemmas was, ultimately, the core of the constitutional reform of a legal order that had been managed by judges, lawyers, prosecutors, attorneys... all educated in traditional *ius commune*.

In this new constitutionalism, a number of principles are at odds with the most significant axioms of the latter. 'The power of applying laws in civil and criminal cases belongs to the judicial courts established by law', stated the Cádiz Constitution in article 17, derived, in turn, from Decree I of 24 September 1810. Yet the state of legislation forced the 1812 judge, as it would had done in the past with the Monarchy's judge, to *search* for the rule in that unmanageable normative repository, with its origins in History, was growing day by day with new legislation. Now, unlike the Monarchy's judge, how was the constitutional judge supposed to search? Paz Alonso provides an excellent hint to answer this question in documenting the interpretation of article 368 of the Constitution by the University of Salamanca. According to said article, the new Constitution had to be taught in 'all universities and literary establishments in which the ecclesiastical and political sciences [were] taught'. However, lacking further instructions, the Salamanca Senate not only incorporated the teaching of constitutional matters into the first department in national law devoted to the study of the *Recopilación*, but also decided that the teaching method to be used was the traditional one of concordances: 'as had been done in the past in order to integrate the *ius proprium* in the *ius commune*; taking the text of the Constitution as the starting point, students are to be indicated the laws of the *Novísima Recopilación* corresponding to each of its articles'.<sup>93</sup>

This decision was not exceptional, but rather followed a logic confirmed by the Cortes themselves and paved a way that judges and jurists, on both shores of the Atlantic, would not abandon for a long time. The fact is that Hispanic constitutionalism, legitimated on both shores in an alleged 'recuperation' of Monarchy laws, interpreted that all of them — be it on the king, the kingdoms, the local authorities, the diverse jurisdictions, etc. — remained alive under the new constitutional order as long as they were not in contradiction with it.<sup>94</sup> No wonder, therefore, that when the town council of Puebla in New Spain swore the Constitution its members committed also to preserve 'the rights, privileges and orders of our city'. Ultimately, Puebla's council was just reproducing the arguments advanced by Dou for justifying his vote during the debate on the Decree abolishing torture.<sup>95</sup> 1812 constitutionalism, as well as its Latin-American counterpart with whom it forms a family, forced the coexistence between its own achievements and the ancient normative bodies. By failing to curb the cumulative dynamics of the Ancien Régime, the doctrinal reading of the normative order gained

<sup>92</sup> DCGE, sitting of 31 March 1811.

<sup>93</sup> Paz Alonso, "La formación de los juristas", in Carlos Garriga (coord.), *Historia y Constitución. Trayectos del constitucionalismo hispano* (México, 2010), p. 313.

<sup>94</sup> Constitution de Apatzigan, art. 211: "(...) mientras que la Soberanía de la Nación forma el cuerpo de leyes, que han de sustituir a las antiguas, *permanecerán éstas en todo su rigor*, a excepción de las que por el presente, y otros decretos se hayan derogado, y de las que en adelante se deroguen"

<sup>95</sup> Alicia Tecuanhuey Sandoval, "Puebla, 1812-1825", in Juan Ortiz Escamilla, José Antonio Serrano Ortega (eds.), *Ayuntamientos y liberalismo gaditano en México* (Zamora Mich., 2007), p. 342.

the upper hand, in spite of the *concordance* requirement with the text of the Constitution. Beyond its determined codifying calling, Gaditan constitutionalism, as most of its Hispanic counterparts, had to face the difficult dilemma of how to handle the new law without abandoning the logic governing the old law, logic that the deficient, if we may qualify it as such, *reform of the justice system* was to underpin.<sup>96</sup>

## Judicial Courts and the Administration of Civil and Criminal Justice

Once the constitutional process was launched in 1808, the enormous shortcomings of justice in each and every one of the territories in the Hispanic Monarchy were put on show.<sup>97</sup> The General and Extraordinary Cortes addressed the reform of the inherited justice system prior to, during and after the approval of the Constitution.<sup>98</sup> We cannot dwell here on its description. Therefore we shall confine ourselves to analyzing one of its most significant aspects: the creation of the Supreme Court (art. 259). The setting up of this court entailed implicitly the suppression of any *consejo* or *junta patrimonial* that could have administered justice in the past, in keeping with the will of unifying the legal order that was a consequence of the codification project. What of kind of court was this? The analysis of its competences shall suffice by way of reply to this question.

The 1812 Constitution stated that it was *incumbent* upon the Court ‘to hear petitions for nullity with the precise goal of reestablishing and restoring the procedure and honoring the responsibility set out in article 254’ (art.261, 9), which in turn made crystal clear that ‘any inobservance of the laws on civil and criminal procedures shall be the personal responsibility of the judges incurring in such practices’. The objective of the petition for nullity, which was otherwise a well-known procedural remedy, did not seek to uphold the law in any respect, but to establish hierarchical instruments for monitoring the personal responsibility of the members of the judicial body. First of all, only this interpretation allows one to explain the Constitution’s decision that ‘all civil and criminal cases’ should terminate in the territory of the court of law’ (art. 262), and, secondly, that criminal cases were excluded from access to petitions for nullity.<sup>99</sup> The constitutional reformulation of petitions for nullity established a close link between the infringement on any rules whatsoever – old or new, material or procedural – and the personal responsibility of judges and magistrates, which was deeply disturbing for the latter, although this *control of men* assigned to the Gaditan Court did not

<sup>96</sup> M<sup>a</sup> del Refugio González, *El derecho civil en México (Apuntes para su estudio)* (México, 1988).

<sup>97</sup> Marta Lorente, José M<sup>a</sup> Portillo, *El momento gaditano. La Constitución en el orbe hispánico (1808-1826)*, (in press).

<sup>98</sup> Fernando Martínez, *Entre confianza y responsabilidad. La justicia del primer constitucionalismo español (1810-1823)* (Madrid, 1999).

<sup>99</sup> The constitutional petition for nullity was developed in a Cortes Decree of 24 March 1813, which extended it to all instances, thereby structuring a hierarchical instrument leading up to the Supreme Court as the guarantor of the highest inspection. Nevertheless, the Court itself consulted the Cortes already in 1813 whether such petitions were also applicable to criminal cases, the reply of the Cortes being negative. Archivo del Congreso de los Diputados (=ACD), Serie General (=SG), leg. 12, exp. 10.

at all resemble that of the French *Cour de cassation*.<sup>100</sup> Furthermore, even though some historians have tried to assimilate not only nullity and cassation, but also *référé - législatif* and submissions to the Supreme Court (art. 261, 10), the truth is that a superficial analysis of the latter proves that comparison to be impossible.<sup>101</sup>

Gaditan constitutionalism created a Court that, not having been conceived as a defense organ of the general laws against the judges' interpretation, allowed the latter to maintain the old interpretative practices. This was the result of the Cortes very particular answer to the following question: In what terms should judges and magistrates express themselves? The General and Extraordinary Cortes, though well acquainted with the *jurisprudential* practices of courts of law, did not bother to consider a draft tabled by the Cortes member Cea, who proposed 'to oblige magistrates to ground their rulings'.<sup>102</sup> In so far as no new elements were introduced in the traditional *proscription of motivating rulings*, it can be stated that the judges and courts imagined by this first attempt at Hispanic constitutionalism remained silent in a double and redundant sense: they did not have to argue in favor of their decisions (except in warrants for arrest) by referring to the applied legislative act nor submit those decisions for printing, which leads us to assume that laws continued to be interpreted 'arbitrarily on the basis of equity or any other pretext'.

To sum up, Beccaria did not convince the Cortes, which ended up *constitutionalizing* a number of practices that prevented the legality principle from being introduced into courts of law. We may ask about the reasons prompting the Cortes to do so, but for the time being we shall confine ourselves to reproduce the more traditional explanation, according to which only codification could put an end to institutional inertias such as the proscription of motivating rulings. To what extent, however, can we be satisfied with this answer?

## An Open-Ended Epilogue: The Criminal Code of 1822 and the Persistence of the Traditional Legal Culture

The Cortes, that gathered from 1810 to 1814, were unable to tackle the codification tasks imposed by the Constitution, and this is why we had to wait until the Liberal Triennium (1820-1823) for the first results to come to light. There is abundant literature on the codification work of the Cortes, from which we shall select a couple of relevant commonplaces.

First of all, historians claim that the Triennium Cortes opted for a special *way* of meeting the codification task, entrusting to parliamentary committees the job of drafting.<sup>103</sup> This decision stands in sharp contrast to subsequent developments when, in the 1840s, the setting up of a Codification Committee deprived the Parliament of such duties, putting them in the hands of a

<sup>100</sup> To the extent that the Audiencia of Extremadura even consulted the Supreme Court on whether to prosecute 'those who did not report on the cases opened in their territory'. ACD, SG, leg. 72, exp. 20. On the french *cassation*, see Jean Louis Halperin, *Le Tribunal de cassation et les pouvoirs sous la Révolution (1790-1799)*, (Paris, 1987).

<sup>101</sup> Yves Louis Hufteau, *Le référé législatif et les pouvoirs du juge dans le silence de la loi* (Paris, 1965).

<sup>102</sup> DSCGE, sesión del 31 de Marzo de 1811.

<sup>103</sup> *Proyecto de Código Penal presentado a las Cortes por la comisión especial nombrada al efecto* (Madrid, 1821).

group of allegedly wise men appointed by the government in power.<sup>104</sup> Secondly, historiography has also emphasized that it was during the Triennium when the lack of coordination that would dominate the entire history of XIX century codification started, which we may summarize more or less as follows: although from the beginning it was considered that the regulation of the legal sources corresponded to the Civil Code, the protracted absence thereof (1889) forced recourse to the medieval and useless Ordenamiento de Alcalá (1348) to determine the ‘order of preference’ in sources that judges and magistrates were supposed to apply.<sup>105</sup>

Nevertheless, the Triennium Cortes approved the first Spanish Criminal Code.<sup>106</sup> Manuel Torres, who has recently analyzed the drafting process in Parliament, argues that ‘actually, the Criminal Code relies on the juridical Enlightenment, with a clear influence from Montesquieu, Rousseau and also Beccaria and Filangieri, although in many occasions the parliamentarians’ quotes of these authors prompt the feeling that they are used only to endow their discourses with prominence and a certain amount of scholarship and are not based on a profound knowledge of their theories. Maybe we should make an exception with Beccaria and Filangieri, who would be very much present during the debate on the death penalty and whose influence is visible in a more direct and coherent manner.<sup>107</sup> Other historians underline the influence of Bentham, who as Torres asserts was the most quoted author during the sittings, even though, as might be recalled, his relationship with the Cortes was not entirely good.<sup>108</sup>

In any case, the presence of Beccaria’s work in the consideration of the draft of the Criminal Code is a commonplace that historiography, since the famous article of José Antón Oneca, has again and again revisited, thoroughly analyzing its influence on 1822’ Criminal Code.<sup>109</sup> We do indeed have much evidence backing up this theory. Calatrava himself, member of the drafting committee, stated: ‘The committee admits naively to have drawn abundantly on the French Code, as well as on the works of Bentham, Filangieri, de Bexon and others it has had at hand’.<sup>110</sup> This *confession* can be linked to a passage in the draft of the Code: ‘Mistrusting the committee on the possibility of finding great help in our legal works, after having conferred over the Codes with greater prestige and reputation in Europe, and having in mind the various systems put forward by the wisest authors (...)’.<sup>111</sup> To sum up, all evidence points to the conclusion that the Triennium Cortes were finally

<sup>104</sup> Blanca Sáenz de Santamaría, *Las Comisiones de Códigos Durante el Reinado de Isabel II (1843-1869)* (Madrid, 2010).

<sup>105</sup> Marta Lorente, *La Voz del Estado. La publicación de las normas (18010-1889)* (Madrid, 1999).

<sup>106</sup> *Código penal español: decretado por las Cortes en 8 de Junio, sancionado por el Rey y mandado promulgar en 9 de Julio de 1822* (Madrid, 1822).

<sup>107</sup> Manuel Torres Aguilar, *Génesis parlamentaria del Código Penal de 1822* (Messina, 2008), p. 87.

<sup>108</sup> Simonnetta Scandellari, ‘Alcune note sull’influenza di Jeremy Bentham nel código penal spagnolo de 1822’, *Bollettino dell’Archivio Storico sardo di Sassari*, X (1984), pp. 127-181. Jeremy Bentham, *Letters to Count Toreno, on the proposed Penal Code, delivered in by the Legislation Committee of the Spanish Cortes, April 25<sup>th</sup>, 1821* (we use the electronic version of this document, available in: [http://oll.libertyfund.org/?option=com\\_staticxt&staticfile=show.php%3Ftitle=2208&chapter=207674&layout=html&Itemid=27](http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=2208&chapter=207674&layout=html&Itemid=27)).

<sup>109</sup> José Antón Oneca, ‘Historia del Código Penal de 1822’, in *Anuario de Derecho Penal y ciencias sociales*, 18 (1965), pp. 273-288,

<sup>110</sup> DSC, sitting of 23 November 1821.

<sup>111</sup> *Proyecto*, p. XII.

able to leave behind the heavy historicism that had marked the normative work of the 1812 Cortes, even though the institutional *inertias* remained.

We are aware that a jurisdictional system cannot be replaced by a legal one overnight. It corresponds thus to the historian to assess the respective weights of tradition and newness in order to probe the depth of the change. While not considering it especially relevant, this historiographical debate, which is as old as it is persistent, can nevertheless provide significant data for carrying out such an assessment. Since Pacheco's statement back in the XIX century that the Criminal Code was published and begun to function as state law, historians have not ceased to discuss whether or not it actually entered into force.<sup>112</sup> Of all the arguments denying the Code's implementation, one deserves to be singled out, namely that it was the Criminal Code committee itself who recommended that it should not enter into force 'until a new procedural Code in criminal matters was sanctioned, the punishment and correctional establishments appropriate to the new penalties system were founded and the general police regulation was published'.<sup>113</sup> This suggestion by the committee confirms that the lack of coordination in codification matters prevailed from the beginning, but it does not tell us whether or not the brand new Code poured its beneficial effects on a population that used to suffer the cruelty of a criminal system managed by a justice establishment not subject to any laws.

Emilio de Benito has clearly shown that prosecutors, lawyers and even judges referred directly or indirectly to the Criminal Code in several proceedings found in different archives. The 1822 Criminal Code entered into force, but this does not mean that the Code *acted as a real Code*, that is, that it repealed any prior rules or case law. Emilio de Benito himself suggests it when, referring to an appeal found in an archive in Madrid, he states the following: 'Although it is true that the arguments used seemed to be based on legislation and practices existing prior to the Code', for the lawyer invokes not only the *Ley de Partidas*, but also a practice derived from Canon Law that, according to him, 'has among us force of genuine law, since it has been not only consented by the Prince, but also approved according to the compiled laws'.<sup>114</sup>

Now that we have reached this point, let us recall again Beccaria's criticism: 'Some rests of Laws from an ancient conquering People, ordered to be compiled by a Prince who reigned in Constantinople twelve centuries ago, mixed subsequently with Lombard rites, and wrapped up in jumbly volumes of private and obscure interpreters, form that tradition of opinions that in large parts of Europe still receives the name of laws.' The entering into force of the Criminal Code in 1822's Spain did not prevent many from continuing to use Barbarian laws and jurists' opinions, since in no other way can a text written in the XIII century (*Las Partidas*) and the practices derived from canon law be described. The Code was simply used as another additional text, losing by this token all the merit that we tend to assign to modern Codes. In the event, Beccaria convinced the Triennium

<sup>112</sup> Juan Francisco Pacheco, *El Código Penal, concordado y comentado* (Madrid, 1856), pp. 41-68.

<sup>113</sup> Emilio de Benito Fraile, "Nuevas aportaciones al estudio sobre la aplicación práctica del Código Penal de 1822", in *Foro. Nueva Época*, 8 (2008), p. 43.

<sup>114</sup> *Ibid.* pp. 60-61.

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legislator, but the latter failed to transform the legal culture and practices that had prevailed into the complex world of courts of law.