

Mortimer Sellers
Tadeusz Tomaszewski
Editors

Ius Gentium: Comparative Perspectives on Law and Justice 3

The Rule of Law in Comparative Perspective



 Springer

THE RULE OF LAW IN
COMPARATIVE
PERSPECTIVE

IUS GENTIUM
COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE

VOLUME 3

Series Editors

Mortimer Sellers
(University of Baltimore)
James R. Maxeiner
(University of Baltimore)

Board of Editors

Myroslava Antonovych (Kyiv-Mohyla Academy)
Nadia de Araujo (Pontifical Catholic University of Rio de Janeiro)
Jasna Bakšić-Muftić (University of Sarajevo)
David L. Carey Miller (University of Aberdeen)
Loussia P. Musse Felix (University of Brasília)
Emanuel Gross (University of Haifa)
James E. Hickey Jr. (Hofstra University)
Jan Klabbers (University of Helsinki)
Claudia Lima Marques (Federal University of Rio Grande do Sul)
Eric Millard (Université Paris Ouest Nanterre)
Gabriël Moens (Murdoch University, Australia)
Raul C. Pangalangan (The University of the Philippines)
Ricardo Leite Pinto (Lusíada University of Lisbon)
Mizanur Rahman (University of Dhaka)
Keita Sato (Chuo University)
Poonam Saxena (University of New Delhi)
Gerry Simpson (University of Melbourne)
Eduard Somers (University of Ghent)
Xinqiang Sun (Beihang University)
Tadeusz Tomaszewski (University of Warsaw)
Jaap W. de Zwaan (Netherlands Inst. of Intrntl. Relations, Clingendael)

THE RULE OF LAW IN COMPARATIVE PERSPECTIVE

Edited by
MORTIMER SELLERS
and
TADEUSZ TOMASZEWSKI

 Springer

Editors

Dr. Mortimer Sellers
University of Baltimore
School of Law
Center for International &
Comparative Law
1420 N. Charles St.
Baltimore MD 21201-4779
USA
mortimer.sellers@gmail.com
msellers@ubalt.edu

Dr. Tadeusz Tomaszewski
University of Warsaw
Faculty of Law and Administration
Krakowskie Przedmiescie
26/28
00-927 Warsaw
Poland
tadtom@wpia.uw.edu.pl

ISBN 978-90-481-3748-0 e-ISBN 978-90-481-3749-7
DOI 10.1007/978-90-481-3749-7
Springer Dordrecht Heidelberg London New York

Library of Congress Control Number: 2010921004

© Springer Science+Business Media B.V. 2010

No part of this work may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher, with the exception of any material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work.

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

*This book is dedicated to the memory of
Tadeusz Kosciuszko
apostle of liberty and the rule of law*

Preface

The papers collected in this volume grow out of a series of discussions on the concept of “The Rule of Law” held at meetings of the European American Consortium for Legal Education in Warsaw (2008), the American Society for Legal History in Tempe, Arizona (2007), and the Association of American Law Schools in San Diego, California (2009). The gathering of the European-American Consortium for Legal Education was particularly significant, because it also marked the two-hundredth anniversary of the University of Warsaw Faculty of Law. We would like to thank those who attended these meetings for their insightful remarks and for their inspiration, suggestions and encouragement in better understanding the rule of law from a comparative perspective.

Thanks are also due to the faculty, staff and students of the University of Baltimore Center for International and Comparative Law who prepared this volume for publication, and particularly to Katie Rolfes, Laurie Schnitzer, Barbara Coyle, Kathryn Spanogle, Morad Eghbal, James Maxeiner, Nicholas Allen, Caroline Andes, Michael Beste, Suzanne Conklin, Pratima Lele, Shandon Phan, T.J. Sachse, Toscha Stoner-Silbaugh and Björn Thorstensen. We are also grateful to David Bederman, Michael Hoeflich, Carl Landauer, David Lieberman, Jules Lobel, Ileana Porrás, and Brian Tamanaha for their comments of earlier versions of the chapters published here.

Imperia legum potentiora quam hominum esto!

Baltimore, MD, USA
Warsaw, Poland

Mortimer Sellers
Tadeusz Tomaszewski

Contents

1	An Introduction to the Rule of Law in Comparative Perspective	1
	Mortimer Sellers	
2	The Rule of Law in Ancient Greek Thought	11
	Fred D. Miller	
3	The Liberal State and Criminal Law Reform in Spain	19
	Aniceto Masferrer	
4	Some Realism About Legal Certainty in the Globalization of the Rule of Law	41
	James R. Maxeiner	
5	Is Goal-Based Regulation Consistent with the Rule of Law?	57
	S.J.A. ter Borg and W.S.R. Stoter	
6	Reflections on Shakespeare and the Rule of Law	71
	Robert W. Peterson	
7	America's Constitutional Rule of Law: Structure and Symbol	89
	Robin Charlow	
8	Constitutions Without Constitutionalism: The Failure of Constitutionalism in Brazil	101
	Augusto Zimmermann	
9	Rule of Law, Power Distribution, and the Problem of Faction in Conflict Interventions	147
	Daniel H. Levine	

10 The Rule of Law in Transitional Justice: The Fujimori Trial in Peru 177
Lisa J. Laplante

11 The Interaction of Customary Law with the Modern Rule of Law in Albania and Kosova 201
Gene Trnaveci

12 Dualism, Domestic Courts, and the Rule of International Law 217
Fiona de Londras

Index 245

Chapter 3

The Liberal State and Criminal Law Reform in Spain

Aniceto Masferrer

Throughout the nineteenth century, European legal science experienced a profound transformations whose consequences are still relevant today.¹

It would be a mistake to suppose, however, that all the legal reforms that took place in Europe in the nineteenth century, originated and developed from nothing. The roots of this process of transformation can already be seen in the sixteenth, seventeenth and especially in the eighteenth century, and the course of the European Enlightenment.

The transformation of legal science was part of a broader development in attitudes towards science in general and towards the duties of the scientist in society. Nineteenth-century legal reforms can only be understood in the context of this altered conception of science, a conception that expressed a new understanding of humankind and society.

I do not intend to present here a panorama of the diverse factors that favoured this transformation, nor to discuss the characteristic traits of nineteenth-century legal science. I will limit myself to giving a brief explanation of two conflicting concepts of law that were current in the nineteenth century.²

3.1 Codification Versus Compilation

The process of Codification was made possible by the triumph of the concept of rational law over the concept of law prevalent in the Ancién Régime.

A. Masferrer (✉)

Comparative Legal History, Faculty of Law, University of Valencia, Valencia, Spain
e-mail: aniceto.masferrer@uv.es

¹ I would like to thank Andrew O'Flynn for his help with making my English more readable.

² On this subject, see Javier Alvarado Planas, in *Juristas Universales* (edit. by Rafael Domingo). Marcial Pons, Madrid, 2004, vol. 3 (Juristas del siglo XIX. De Savigny a Kelsen, "Introducción"), pp. 23–57.

This change eventually led to the abandonment of the old compilation technique of understanding the law. Under this older dispensation, compilers would collect all the legislation that was in force, including some laws which might have been promulgated centuries before.

During the nineteenth century lawyers began to see existing laws more in the context of history, and of historical developments that altered the structure of law and society. This raised fundamental questions about the nature of law. What was law? There were two main positions:

1. That law was the product of reason (law was the result of purely rational operations).
2. That the law was the product of history (in which case, law was the result of each group or community's own historical tradition).

On a deeper level, there was a conflict between two ways of understanding not only law, but also life itself,

1. The rationalist conception advocated the world of reason. A world of ideas, of pre-established order, of the importance of systems, and of deduction, and this conception disassociated itself from history and tradition, since it was believed that they impeded both progress and modernization.
2. The romantic and historical conception, which defended and exalted the world of feelings, of passion, of the spontaneous, and all that was concrete, tangible, and palpable. In short, a world without a pre-established order or system.

This confrontation lasted an entire century, and ended with the triumph of rationalist theory. An accurate reflection of this final result can be seen in the outcome of the dispute between Jacobins (who were rationalists) and *Girondins* (traditionalists) during the French Revolution after 1789.

One of the clearest signs of the triumph of rationalism over historicism was the codification movement.

The idea of a "Legal Code" signified, for those who promoted the idea, much more than a mere collection of rules gathered in a single book, edition, or volume. The introduction of a "Code" meant a break with the past and with tradition; to dispose of the old and incorporate the new. This "new" arrangement was not meant to be understood as a mere reform of the old, but rather as an authentic break with the past, as if the "new" had no connection at all with what had existed up until that moment. This is how one of the protagonists of the codification movement expressed it:

"... a legal order in which nothing was worthy of respect, or conservation: no part of which could be saved for the ordering of a future society. All of it, absolutely all of it, needed to be left behind. (...) The cart of destruction and reform had to pass through the ruined building, because in it there was scarcely an arch, scarcely a

column that neither could nor should be saved. In Spanish Criminal law there was only one legitimate and viable system, the system of codification, the system of absolute change.”³

“The system of codification, the system of absolute change, was the only legitimate and indeed, the only possible system,” affirmed the commentator Joaquín Francisco Pacheco, highlighting the identification of “codification” with “absolute change,” ideas which were antithetical to “compilation” and “tradition.” If the criminal legislation contained in the Compilations of the modern age represented the law that came from tradition, and the concrete history of each locality, kingdom or crown, the criminal legislation that constituted the Codes responded not to tradition, but rather to reason: to that which the mentality of the time judged to be rational and reasonable. Considering that which was historical and traditional to be reactionary and unworthy of modern times, reason became the emblem and sign of the (new) modernity.

The codifying phenomenon was not simply another demand of liberal enlightenment thought, but was rather a “postulate of the whole movement,” and was brandished “as a symbol of radical renovation.”⁴ Codification and rationalist natural law theory (*iusnaturalism*) were closely linked concepts. They both took for granted the existence of conditions of equality in society, conditions that patently did not exist, in fact, as one commentator remarked, “(society) literally overflows with inequality.”⁵ The codifying phenomenon seemed to be the final stage in the already secular tendency toward legal unification. The eighteenth century ideologies of the Enlightenment acted as vehicles for the codification movement, and it is obvious that the objective of this movement was not to produce compilations, but rather, in keeping with enlightenment thought, to reform and to innovate. The codification movement was able to collate systematically the

³ Pacheco, Joaquín Francisco: *El Código penal concordado y comentado*. Madrid, 1848 (from the latest edition: Madrid, Edisofer, 2000), p. 82; Pacheco is one of the most remarkable nineteenth century Criminal law scholar and the main commentator of the Spanish Criminal Codes of 1848 and 1850; on this matter, see Cuello Calón, Eugenio: “Centenario del Código de 1848: Pacheco, penalista y legislador”, *Información Jurídica*. Madrid, 1948, pp. 5–8; Jiménez De Asúa, Luis: “Pacheco, en el centenario del Código penal español”, *El Criminalista* (Buenos Aires) 9 (1951), pp. 20–22; Antón Oneca, José: “El Código penal de 1848 y D. Joaquín Francisco Pacheco”, *ADPCP* 18 (1965), pp. 473–495; Candil Jimenez, Francisco: “Observaciones sobre la intervención de D. Joaquín Francisco Pacheco en la colaboración del Código Penal de 1848”, *ADPCP* 28 (1975), pp. 405–441; RODRÍGUEZ GIL, M. Magdalena: “Joaquín Francisco Pacheco, un penalista en el marco constitucional”, *Revista de la Facultad de Derecho de la Universidad Complutense* 83 (1993–1994), pp. 259–294; Pacheco also wrote his *Estudios de Derecho Penal* (lectures given at the *Ateneo* of Madrid). Madrid, 1868.

⁴ Caroni, Pio: *Lecciones catalanas sobre la historia de la Codificación*. Madrid, 1996, p. 35.

⁵ Caroni, *Lecciones catalanas sobre la historia de la Codificación*, p. 43.

new ideas of the Enlightenment, which provided a doctrinal body that was extraordinarily critical of authoritarian political systems. These systems were finally dismantled thanks to the triumph of the Liberal revolutions.

According to the legal historian Giovanni Tarello, the codification of modern Criminal law was carried out at the end of the eighteenth century and the beginning of the nineteenth century. Its objective was to create a brief and concise criminal justice system that could realize three great, elementary principles: (1) the unity of the subject of Criminal law; (2) the reduction of the objects of Criminal law to two: the public sphere (organization and public order) and the private sphere (life, health, and property); and (3) the reduction of punishments to three (the death penalty, the deprivation of freedom and financial penalties) two of which were quantifiable.⁶

Criminal law codification was perceived as the ideal tool to introduce a secularized penal law that could satisfy the political and intellectual demands of modern times. It also marked the definitive abandonment of the old legal arguments based purely on “authority” and substituted the casuistic method for the systematic method.

The process of codification was intended to introduce both a new law and a new legal science that had nothing to do with the Ancién Regime. Nevertheless, one must ask to what extent this aim was achieved. If the rupture were as sharp as its advocates claimed, there would be little reason even to remember the older system. It might indeed be better to leave history behind and begin directly with the study of contemporary Criminal law. But in fact, so clean a break with history is almost never complete. Tradition still helps in understanding many elements of modern Criminal law.

The dichotomy between rationalism and historicism is never as complete as the advocates of either position imagine. Law always has of both a rational and a historical component. Law can be in part both relatively static and dynamic at the same time. Some of its principles achieve near permanence, while others might come to be criticized as outdated. This responds to the human condition itself, as there are some permanent principles and values that can be comprehended by reason, and some rules that derive from the culture and idiosyncrasies of each group or society. It was an analysis of these questions that led me to examine in a critical light the common belief that the Codification of Criminal law wiped the slate clean with respect to the Criminal law tradition of the past.⁷

⁶ Tarello, Giovanni: *Cultura jurídica y política del Derecho* (trad. I. Rosas Alvarado), Mexico, 1995, p. 54.

⁷ On this question, which is rather more complex than I have expounded, see Masferrer, Aniceto: *Tradiccion y reformismo reformismo en la Codificación penal española. Hacia el ocaso de un mito. Materiales, apuntes y reflexiones para un nuevo enfoque metodológico e historiográfico del movimiento codificador penal europeo*. Prologue

Anyone who has even a summary knowledge of the Spanish or European Criminal law tradition knows that current penal law is indebted and sometimes quite heavily indebted, to ancient traditions, and that the same may be said of private, commercial, or procedural law.

Thus the history of Criminal law should not be of interest only to scholars of dead institutions, but also to jurists who seek a thorough understanding of contemporary European Criminal law. Looking back at the tradition of Criminal law one may find many concepts that are out of phase with current thinking, but there are also a number of elements and principles that are maintained in modern European legal systems. There are even occasions when tendencies and concepts that had seemed to be buried by history centuries ago resurface, and gain new relevance.

The reformists saw codification as the only adequate instrument that would enable them to obtain the changes they desired. They did not realize, however, that, in much the same way as had occurred in private law, and despite all the innovations that the “new science” might promise, lawyers would continue to rely on the conceptual instruments provided by the Roman-canonical tradition, “and in fact the systematic whole that was constructed from individual concepts, although re-examined, could only be Roman.”⁸ It has been said that the main merit of codification was not so much the creation of new figures or principles, “but rather its formulation of dogmas that, together comprised a system.”⁹ Codification was the modern method of rationalist natural law (*iusnaturalism*), but it constructed over a base of notions, concepts, figures, and principles that came from Roman-canonical Law.¹⁰

3.2 Constitutionalism, Liberalism, and Reform

The first part of this article, discussed the codifying ideal.

The second part will continue by examining the fundamental characteristics of the science of Criminal law in the nineteenth century, as crystallized in the legal framework of codification. I will make a distinction between questions of a political nature and those that belong strictly to the field of criminal science. The story begins with the fundamental political-criminal law postulates of Enlightenment thought. It is quite clear that Enlightenment principles could only be put into practice once

by J. Sainz Guerra. University of Jaen, 2003, research in which this problem is more extensively developed.

⁸ Cannata, Carlo Augusto: *Historia de la ciencia jurídica europea* (trad. L. Gutiérrez-Masson). Madrid, 1989, p. 178.

⁹ Lalinde Abadía, Jesús: *Iniciación histórica al Derecho español*. Barcelona, 1983, p. 669.

¹⁰ Zajtay, Imre: “The permanence of Roman Law Concepts”, *European Legal Cultures* (V. Gessner / A. Hoeland / C. Varga, eds.). Dartmouth, 1996, pp. 67–68.

there had been to political change. If the political reformist movement had not prospered, then it is unlikely that these principles would have been applied.¹¹

It is not my intention to focus on nineteenth century criminal historiography,¹² nor to comment on the different doctrinal currents and scientific schools of thought that existed throughout the nineteenth century.¹³ I shall concentrate instead on enlightenment liberalism, and its influence on the reform of Spanish Criminal law.

The evolution of criminal legal science can only be understood by recognizing its fundamental departure point: the intimate connection between enlightenment thought, the Liberal system, and political-criminal legal reform. It is important to bear in mind that scientific criminal law reform was only made possible by the advent of the Liberal State, the political regime that permitted the incorporation of new political and criminal legal principles that would constitute the foundation of the new criminal legal science.

Taking this to be the starting point, it seems logical to continue with a brief analysis of Enlightenment thought, the Liberal system, and political-criminal legal reform.¹⁴

As is well known, in the legal field, the Enlightenment movement took its bearings from rationalist theories of natural law (*ius naturalism*). The supporters of these theories advocated a social ethic that stemmed from their perception of nature, an ethic that was crystallized in a law (the natural) that could enter in conflict with positive law. “The axis of the new

¹¹ Here it really is consistent to speak of a total rupture between the old and the new order, a true reflection of two very different political systems that were opposites in many respects.

¹² On this point, see the works of Baró Pazos, “Historiografía sobre la Codificación del Derecho penal en el siglo XIX”, in *Doce estudios de historiografía contemporánea*. Santander, 1991, pp. 11–40; Álvarez Alonso, Clara: “Tendencias generales de la historiografía penal en España desde el siglo XIX”, in *Hispania. Entre derechos propios y derechos nacionales. Acti del'incontro di studio Firenze-Lucia 25, 26, 27 maggio 1989. Per la storia del pensiero giuridico moderno 34/35*, Milano-Giuffrè Editore, vol. II, pp. 969–984; Masferrer, Aniceto: “El *ius commune* en la historiografía penal española. Una apuesta metodológica de apertura hacia lo supranacional y europeo”, O. Condorelli, E. Montanos-Ferrín, K. Pennington, Hgg., *Studi in Onore di Manlio Bellomo*, Roma, 2004, t. III, pp. 563–587; SAINZ GUERRA, Juan: *La evolución del Derecho penal en España*. Jaén, Universidad de Jaén, 2004, pp. 47–69.

¹³ Sánchez González, María Dolores del Mar: “Historiografía penal española (1808–1870): La Escuela Clásica española”, in *Estudios de Historia de las Ciencias Criminales en España* (J. Alvarado y A. Serrano Mañlo, eds.). Madrid, Dykinson, 2007, pp. 69–129, where a clear exposition on the Spanish Classical School can be found.

¹⁴ For a wider panoramic of this question, see Masferrer, *Tradición y reformismo en la Codificación penal española...* cit., pp. 69–91.

methodology” states Cannata, “resided in the rejection of the principle of authority that had characterized the Middle Ages.”¹⁵

It was the humanitarianism of the Enlightenment, and the postulates that animated the French Revolution, that demanded certain reforms in the legal system. The legal historian Jesús Lalinde has synthesized these reforms into six: the legality of crime and punishment, the proportionality between crime and punishment, the individuality of punishment, and the concepts of favourable decision, favourable interpretation, and the presumption of innocence.¹⁶ These reforms would probably never have been carried out if it had not been for the triumph of the Liberal State, as it was the Liberal State that created the political conditions that enabled the reform of Criminal law. However, I would like to insist on an idea that seems fundamental to me: many of these legal reforms did not constitute true victories of the codifying movement, as the majority of these principles had already been defended by the doctrine of *ius commune*. They were not a discovery of the new penal science that was rooted solely in Enlightenment thought.

In this sense, the “merit” of the Enlightenment was more or less opportunism, as it offered a doctrinal platform for political-criminal law at a moment in which, following the pace of political conquests, these ideas could effectively be taken into account and introduced into the legal systems of the day. This began a new era in Criminal law that can justifiably be referred to as the beginning of modern criminal science. It stands in marked contrast to previous criminal science that, constrained by absolutist political systems, belonged to a completely distinct era, i.e., the Ancien Régime.

3.2.1 The Rise of Enlightenment Political-Criminal Legal Thought in Europe and Spain

As is widely known, the theories of René Descartes (1596–1650) opened up a new stage in European legal culture. Using deductive reasoning as its method, the Cartesian approach was rooted in the idea of the rational and social nature of humanity. Its followers believed that deductive reasoning led to the construction of a system of values and principles with universal validity, and it was from these universal values and principles that positive law had to be judged and justified. Rational natural law (*iusnaturalism*) abandoned the medieval doctrine of *ius naturale* and created a new law,

¹⁵ Cannata, *Historia de la ciencia jurídica europea*, p. 173.

¹⁶ Lalinde Abadía, *Iniciación histórica al Derecho español*, p. 669; about the presumption of innocence in Enlightenment thought and its roots in the glossators’ doctrine, see the work of Hruschka, Joachim: “Die Unschuldsvemutung in der Rechtsphilosophie der Aufklärung”, in *ZStW* 112 (1990) Heft 2, pp. 285–300.

using for this purpose the experience of historicity and the materials of the *Corpus Iuris*, in order to formulate a rationally-based legal system.

“Iusrationalism” was closely linked with the wider intellectual and political movement of the Enlightenment that dominated European thought in the eighteenth century. Although “iusrationalism” adopted different forms in England, France, and Germany, they all shared an attitude of rational criticism towards the social and legal orders of the time.¹⁷

From the second half of the eighteenth century onwards, Enlightenment thought initiated an intense debate throughout Europe concerning (to use the expression of the legal historian Giovanni Tarello) the “criminal problem.”¹⁸ The demands for the reform of Criminal law made by enlightenment thinkers were a sign of a new way of thinking about law in general. In this sense, the concern for a more systematic Criminal law is consistent with the logical and deductive methodology and the systematic ideal of the new rational legal science. The aim of secularizing the Criminal law is also perfectly coherent with the Enlightenment goal of secularizing society and law in general¹⁹. Furthermore, the humanizing ideal of Criminal law in this period followed the path of the new social ethic adopted by enlightenment thinkers.

These three principles—the systematic principle, secularization and humanization—synthesize, in my opinion, the main contributions of Enlightenment thought to Criminal law. The development and implementation of these principles in positive Criminal law reflect the most important aspects of nineteenth-century criminal legal science.

Although the humanization of the Criminal law had already been demanded by both medieval and contemporary doctrine,²⁰ it is indisputable that the political-legal thought of the Enlightenment was keen to

¹⁷ The rationalist methodology in the legal field was cultivated first by Hugo Grotius (1583–1645) in the Netherlands, and by Pufendorf (1632–1694), Thomasius (1655–1728) and Wolff (1679–1754) in Germany, and by Domat (1625–1696) in France.

¹⁸ Tarello, Giovanni: *Storia della cultura giuridica moderna*. Vol. I: Assolutismo e codificazione del diritto. Bologna, 1976, p. 383; for an interesting treatment of Enlightenment thought and criminal law, see pp. 383–483.

¹⁹ For this aspect, see *Cristianesimo secolarizzazione e diritto moderno* (a cura di Luigi Lombardi Vallauri / Gerhard Dilcher). Per la storia del pensiero giuridico moderno 11/12. Nomos Verlagsgesellschaft (Baden-Baden)—Giuffrè Editore (Milano), 1981, pp. 1201 ff., where some articles about criminal law are collected; the secularization process began in Germany in the sixteenth century, as Sellert has shown: SELLERT, Wolfgang: “Die Krise des Straf- und Strafprozeßrechts und ihre Überwindung im 16. Jahrhundert durch Rezeption und Säkularisation”, in *Säkulare Aspekte der Reformationszeit*. München-Wien, 1983, pp. 27–48.

²⁰ The principle most open to question among those I have mentioned would be that of the humanisation of criminal law. This is not because one can doubt the sincerity of the humanitarian theses linked to Enlightenment ethics, but rather because this was not a new contribution with respect to the previous criminal law tradition, at least as far as legal scientific doctrine is concerned. Some jurists from the *ius commune* tradition

humanize the Criminal law. This can be seen in the gradual process of decriminalization of certain acts and the overall reduction in the number of acts considered to be criminal offences. However, these tendencies, while certainly in keeping with the desire to humanize Criminal law, might also be said to be partly a consequence of its secularization.

Tarello maintains that both the, “removal of the figures that Criminal law sought to repress and (...) the drastic reduction of the instruments of repression” responded to the new demands of the codifying task. In effect, “a brief and systematic body of rules governing the repression (of criminal acts) was not possible without destroying a large part of both the objects and the methods of repression.”²¹ Despite the truth of this formal explanation of the codifying technique, no one, including Tarello, is unaware of the fact that the reduction in the number of acts classed as crimes was also due to the rationalist ideology that sought to make sure that punishments were in proportion to the crimes committed. Furthermore, it was humanitarian ideology that favoured, not only the decriminalization of many acts, but also showed a preference for imprisonment and economic sanctions as forms of punishment.²²

Among those who best represent the move for both political and Criminal law reform at the time were Cesare Beccaria (1738–1794), Gaetano Filangieri (1752–1788), Gian Domenico Romagnosi (1761–1834) and Paul J.A. Feuerbach (1775–1833). Only Feuerbach and Filangieri can be considered true experts in Criminal law, the other two were enlightened authors that vehemently criticized the existing system of Criminal law. Before them, Voltaire, Montesquieu, Grotius, Hobbes, Pufendorf and Locke had all been critical of their respective legal systems. The most well-known Spanish figure was Manuel de Lardizabal.²³

3.2.2 The Political Reforms of Liberalism and Their Consequences for Criminal Law

The demands for Criminal law reform made by enlightenment thinkers would not have prospered, at least in the short term, without the success

had already considered the importance of humanising punishments, as well as the convenience of introducing punishments that were proportional to the offences committed. According to Lalinde, *iusrationalism* of the sixteenth and seventeenth centuries, which developed the theories of Saint Thomas, had already defended the need for proportionality between crime and punishment, stating that the punishment ought to be less severe than the gravity of the offence (Lalinde Abadía, *Iniciación histórica al Derecho español*, p. 667).

²¹ Tarello, *Cultura jurídica y política del Derecho*, p. 53.

²² Tarello, *Cultura jurídica y política del Derecho*, p. 54.

²³ On this matter, see RAMOS VÁZQUEZ, Isabel: “El Derecho penal de la ilustración”, in *Estudios de Historia de las Ciencias Criminales en España* (J. Alvarado y A. Serrano Mañillo, eds.). Madrid, Dykinson, 2007, pp. 43–68.

of the Liberal revolutions. Criminal law was reformed not only thanks to the development of new ideas but because those that advocated its reform gained political power and proceeded to dismantle the Ancién Regime. This led to a new phase in history, the Liberal age. The conditions that would allow for the reform of Criminal law were now in place, through the coupling of Enlightenment thinking with the Liberal State. Of course, codification was not entirely dependant on the success of the Liberal revolutions; in fact, some of the first works that attempted to codify Criminal law took place within the framework of non-liberal political systems. That is the case of the Prussian Allgemeines Landrecht (ALR) in 1794. However, I believe it is inappropriate to use the expression “iusrationalist codes,” as such attempts at codification had little to do with the “Liberal codes”²⁴ that followed them. It is better to speak of “Enlightenment codes” and “Liberal codes.”

Great reforms in Criminal Law took place within each of the Liberal States, as they applied the new ideas of the Enlightenment. Many of these reforms took place before codification; though a large number were later to be adopted by codification, some almost at once while others more gradually. However, the effective application of these reforms was only made possible by the success of the Liberal system, without which the critical voices of the Enlightenment thinkers would almost certainly not have been heard. Even so, most of the reforms carried out were not in response to new ideas, although certain commentators have made it seem that that was the case. In fact, centuries before, the legal doctrine of *ius commune* had proposed change,²⁵ although the legislation passed during the time of the Ancién Regime had preferred to attend to other interests.

3.2.2.1 The Principle of Legality

The reform of Criminal law was one of the great objectives of the French Revolution, and Voltaire had played an important role in promoting reform.²⁶ Among Voltaire’s strongest demands was his insistence that Criminal law should be clearer and more precise, and that all arbitrary judicial decisions should be subjected to the law. The law had to express clearly both the conduct that constituted a criminal act and the designated punishment.

²⁴ Caroni, *Lecciones catalanas sobre historia de la Codificación*, pp. 69 ff.

²⁵ On the Criminal law science in the *Ancién Regime*, see Pérez Marcos, Regina: “Notas sobre la génesis de la Ciencia penal España”, in *Estudios de Historia de las Ciencias Criminales en España* (J. Alvarado y A. Serrano Mañillo, eds.). Madrid, Dykinson, 2007, pp. 19–41.

²⁶ Already a classic work on this question is that of Herzt, Eduard: *Voltaire und die französische Strafrechtspflege im 18. Jahrhundert. Ein Beitrag zur Geschichte des Aufklärungszeitalters*. Stuttgart, 1887 (reed. Aalen Verlag, 1972).

Voltaire was not alone in his criticisms of the Criminal law of the time, since others authors such as, Mably, Chaussard, Servan, Marat, Carrard, Risi and Vermeil, raised their voices against it and defended the need for a new system of Criminal law in which the penalty imposed by the judge could not transcend certain pre-established legal limits.²⁷

The philosophy of rational natural law presented the law as the only instrument that was capable of carrying out the proposed reorganization of the legal system, and more specifically to do so through codification. The application of the principle of legality was not only to be a right of each citizen, but it was the only technical means suitable for the realization of a new system of Criminal law. It was, in fact, essential to this enterprise, as any legal code would have to respect this principle scrupulously, and it was of the greatest importance that this principle be respected above all in Criminal law, the guardian of all individual rights.

The first attempts at codification in Europe were the product of the school of natural law rather than French rationalism, and allowed judges a certain margin in which to use discretionary powers and sentence “ex aequo et bono.” The Prussian *Verbessertes Landrecht* (1721), the Bavarian *Codex juris criminalis* (1751) and the *Constitutio Theresiana* (1769) are all clear examples of this.

The first European Criminal Code that embraced the principle of legality without any ambiguity, and expressly prohibited both arbitrary judicial decisions and the use of analogy was the *Allgemeine Gesetz über Verbrechen und Strafen* of Joseph II (1787). Rather more ambiguous on this point was the Prussian *Allgemeines Landrecht* (1794). Although it affirmed the principle of legality in most instances, such as by its exclusion of any possible retroactive effects of Criminal law, it contained a disposition that allowed for the possibility of punishing those acts that were committed against “natural law”, even when these acts were not specifically forbidden in positive law. This disposition tainted, at least in the opinion of Schnapper, the principle of legality.²⁸

The first codes incorporated the principle of legality without consistently following all its logical consequences. However, the Bavarian Code of 1813, which was written by Feuerbach, did follow the principle coherently and excluded both the use of analogy and arbitrary judicial decisions. In France, after the Criminal Code of 1791, which had established an excessively rigid system in which punishments were fixed without any possibility of reprieve,

²⁷ On this matter, apart from the bibliography collected in Masferrer, *Tradición y reformismo en la Codificación penal española...*, pp. 60, footnote 120, and 82, footnote 178, see especially the study of Schnapper, Bernard: “Les peines arbitraires du XIIIe au XVIIIe siècle (doctrines savantes et usages français), *R.H.D.* 41 (1973), pp. 237–277 and 42 (1974), pp. 81–112; later reedited as a monography (Paris, 1974), which is the edition I have used.

²⁸ Schnapper, *Les peines arbitraires du XIIIe au XVIIIe siècle...*cit., pp. 67–68.

the Criminal Code of 1810 adopted a more flexible approach to the principle of legality, and judges were given the freedom to impose sentences that could vary between pre-established maximums and minimums.

It was this model that was to be followed by a number of European countries, Spain among them.

Although, as I have mentioned, it was the doctrine of *ius commune* that had developed the principle of legality much earlier, one of the great advances of nineteenth century juridical science was unquestionably the embodiment of this principle in law, and particularly its incorporation into the constitutions of Europe and the Americas.²⁹

In effect, the inclusion of the principle of legality in the constitutional framework caused an almost “Copernican revolution” in the development of Criminal Law. While this principle had deep historical roots,³⁰ it was the success of the Liberal revolutions that enabled the principle to be integrated into the constitutions of the period and followed coherently throughout the legal system.

The first constitutions and bills of rights contained this principle. That is the case of the Declaration of the Rights of Man and Citizen of 1789 (art. 8), the French Constitution of 1791, as well as other European and American constitutions. Later on, it would be stated in the Universal Declaration Human Rights in 1948 (art. 11.2), and two years later in the European Convention for the Protection of Human Rights and Fundamental Liberties (art. 7).

In Spain, the principle of legality was written into all of the Constitutions of the nineteenth and twentieth centuries (1812, 1837, 1845, 1869, 1876, 1931 and 1978),³¹ even though it was not explicitly contained in the text of 1812.³²

²⁹ Masferrer, *Tradicón y reformismo en la Codificación penal española...cit.*, pp. 75–76 and 111–113.

³⁰ Concerning the history of this principle, see the plentiful bibliography collected in Masferrer, Aniceto: “La historiografía penal española del siglo XX. Una aproximación a sus principales líneas temáticas y metodológicas”, *Rudimentos Legales* 5 (2003), footnote 199.

³¹ The Constitution of 1812 was the only one that did not expressly mention this principle, though it can be deduced from the interpretation of some precepts; art. 9 Constitution 1837; art. 9 Constitution 1845; art. 10, Constitution *nonnata* (1856); art. 11, Constitution 1869; art. 16 Constitution 1876; art. 28 Constitution 1931; arts. 3 and 25.1 Constitution of 1978.

³² Concerning the evolution of this principle in Spanish constitutionalism, see the study of Ruíz Robledo, Agustín: “El principio de legalidad penal en la historia constitucional española”, *Revista de Derecho Político* 42 (1997), pp. 137–169.

Nowadays, an express recognition of the principle of legality is one of the most commonly found Criminal law precepts in European constitutionalism.³³

3.2.2.2 The Principle of Proportionality Between Crime and Punishment

The lack of proportion between crime and punishment was one of the most consistent criticisms made by Enlightenment thinkers against the Ancién Regime. Montesquieu, Beccaria, Bentham, and in Spain Lardizábal promoted a new Criminal law that would observe at least a minimal sense of proportion between the crime committed and the sentence received.

Despite the protests of some jurists from the *ius commune* tradition, the principle of proportional justice was not consistently respected by the lawmakers of the Ancién Regime, and this was particularly notable in the criminal legislation issued by the absolute monarchs of eighteenth century Spain. The situation in Spain is in fact a very clear case of the neglect of this principle. The legal historian Tomás y Valiente has drawn attention to the fact that the way in which the severity of the punishment was calculated, frequently bore no relation to the gravity of the crime committed or the degree of guilt of the accused. It was instead based upon entirely different criteria, such as the number of times a certain offence had been committed by the accused, or a lack of remorse on the part of the prisoner. In the case of fines and the confiscation of property the criteria employed depended upon the economic need of the justice administration.³⁴

The problem was not the lack of a juridical doctrine that expressed the desirability of the principle of proportionality, but rather that such a doctrine could only be effectively applied by changing the political system, so that it would be willing to act in accordance with that principle.

A great effort was made by a number of Enlightenment thinkers to introduce the principle of proportionality into their respective legal systems. A clear example of this is the work of Filangieri, as has been extensively recorded by a German legal historian.³⁵ Tarello believed that this desire to implement the principle of proportionality explains the prevalence of punishments that can be varied to suit the crime by neat acts

³³ See, as an example, article 103. 2 of the current German Constitution, a precept which is in perfect accord with German constitutional history, as may be deduced from a reading of German constitutional texts, i.e., Hessen (1820), Prussia (1848–1850), as well as Weimar (1919), among others.

³⁴ Tomás y Valiente, Francisco: *El Derecho penal de la Monarquía absoluta (Siglos XVI, XVII y XVIII)*. Salamanca, 1969, pp. 359 ff.

³⁵ Seelmann, Kurt: "Gaetano Filangieri und die Proportionalität von Straftat und Strafe", *ZStW* 97 (1985) Heft 2, pp. 241–267.

of multiplication or division. These types of punishments were essentially fines and imprisonment.³⁶

I think it should be pointed out, without wishing to deny the merit of Enlightenment thinkers, that jurists from the scholastic tradition had written on the need for proportionality in Criminal law many centuries before, but only the advent of the Liberal political system made its application possible.

3.2.2.3 The Principle of the Individual Attribution of Punishments

One of the most important contributions to Criminal law made by the political reforms of the Liberal States was the abolition of punishments that affected groups of people that were connected to the perpetrator (by marriage or blood ties) but who were known not to have played any part in the crime committed. This practice had been criticised for being contrary to the principle of the individual attribution of punishments since the very beginnings of the Ancién Regime and these criticisms were taken up by Enlightenment authors.

The fact that these “transcendental punishments” (in Spanish, “trascendencia de las penas,” since they affected those who have not committed any offence), together with the practice of torture and the confiscation of goods, continued into the eighteenth century are clear evidence of the backward and neglected state of Criminal law in the period. One nineteenth century author commented that this situation represented “the darkest pages of contemporary history.”³⁷

The only class of punishments that automatically affected third parties who had committed no crime but who bore some connection to the criminal was the confiscation of property. This class of punishment was later abandoned precisely because it contravened the principle of the personal attribution of punishments.

There were, however, other specific crimes for which the law established “transcendental punishments.” These punishments were only imposed for the crime of high treason, or for offences against his divine majesty,³⁸

³⁶ Tarello, *Cultura jurídica y política del Derecho*, p. 54.

³⁷ Cadafalch y Buguñá, Joaquín: *Discurso sobre el atraso y descuido del Derecho penal hasta el siglo XVIII*. Madrid, 1849, p. 23.

³⁸ The short statement of Tomas y Valiente, in which he remarked that «the punishment of infamy also affected third parties» was not accurate (Tomas y Valiente, *El Derecho penal de la Monarquía absoluta*. .cit., p. 394). I have already had the chance of demonstrating in another place the intranscendent character of the legal sentence of infamy. I commented on that occasion that it has sometimes erroneously been ascribed this effect due to what I termed the «attractive force of the penalty of crimes against the Royal Person» which existed in the Castilian criminal law tradition of the Ancién Regime (Masferrer, Aniceto: *La pena de infamia en el Derecho histórico español*.

for which the direct descendants of the offender were branded with the juridical condition of “infamis” (infamous).

Even as late as the second half of the eighteenth century certain jurists that belonged to the *ius commune* tradition (such as Alfonso de Castro) argued in favour of these “transcendental punishments.” However, their arguments lacked depth and coherency, and betrayed a desire to conform to the tenets of the absolutist system. Lardizábal and the other leading jurists of the time were very clear in their opposition to any punishment that could be transferred to the descendants of the perpetrator. Lardizábal wrote specifically against the practice of transmitting the juridical category of infamis to the descendants of those found guilty of the crime of high treason or offences against “his divine majesty,”³⁹ and his opposition was shared unanimously by all Enlightenment thinkers.

This total rejection of “transcendental punishments” can be seen in the great number of works that criticised and rejected the practice,⁴⁰ such as those of José Marcos Gutiérrez⁴¹ and Antonio de Elizondo. Elizondo wrote: “The horror of the punishment of branding people “infamis” is that it is not an individual punishment, and it is used for very serious crimes when the legislator can think of no better way to correct the lawbreaker and improve his behaviour.”⁴²

The personal attribution of punishments, by which the punishment for a crime is only applied to its perpetrator, was one of the most important Criminal law principles to be included in the constitutional texts, and supposed the definitive abolition of transcendent punishments.⁴³ In fact, the express abolition of transcendent punishments in the Constitution of Cádiz

Contribución al estudio de la tradición penal europea en el marco del ius commune. Madrid, Dykinson, Madrid, 2001, pp. 294 and 397).

³⁹ Lardizábal y Uribe, *Discurso sobre las penas*, ap. IV, tít. V, 9–10.

⁴⁰ Pérez y López, Antonio Xavier, in his *Discurso sobre la honra y la deshonra legal, en que se manifiesta el verdadero mérito de la Nobleza de sangre, y se prueba que todos los oficios necesarios y utiles al Estado son honrados por las Leyes del Reyno, según las quales solamente el delito propio disfama* (Madrid, 1781), pp. 153–172, supports the idea of maintaining the imposition of the penalty of infamy on the descendants of those found guilty of crimes against the person of the Monarch, a position which, Tomás y Valiente, in *El Derecho penal de la Monarquía absoluta...cit.*, p. 110, describes as “untenable from the perspective of rationalist and Enlightenment principles”.

⁴¹ Gutiérrez, José Marcos: *Práctica criminal de España*. Madrid, 1804 (I have used the 2nd edition: Madrid, 1819) vol. III, p. 141.

⁴² Elizondo, Fco. Antonio de: *Práctica universal forense de los tribunales de España e Indias*. Madrid, 1784, vol IV, p. 174; this author, when criticising the validity of the transcendent effect of this punishment at the end of the eighteenth century, not only follows Lardizabal’s opinion, but even reproduces it literally (see pp. 175–176).

⁴³ Masferrer, *Tradicición y reformismo en la Codificación penal española...cit.*, pp. 77–79.

was so definitive,⁴⁴ that no other constitutional text made reference to them again.

At the beginning of the nineteenth century, it was incontrovertible that “in a Liberal society, following the principles of individuality and rationality, the punishment for a crime has to be imposed on the person that has committed it, without affecting the members of his family.”⁴⁵

The Cortes of Cádiz decided to protect the honour of the family name still further by banning not only these transcendent punishments but by erasing the visible and latent effects of the application of these penalties in the past. This was the thinking behind the Decree of the 22nd of February 1813, which ordered that “all the pictures, paintings and inscriptions which contain the names or images of those punished by the Inquisition that are kept in Churches, cloisters and convents, or in any public place in the Kingdom shall be erased or taken down from where they hang.”⁴⁶ This measure allowed the wounds to heal of those that had been affected by the punishment of branding whole families with the tag of “infamis,” a punishment that had been applied to the families of those condemned by the Tribunal of the Inquisition.⁴⁷

3.2.2.4 The Process of the Abolition of Certain Punishments

The Enlightenment thinkers saw many of their proposals incorporated into the political reforms made by the Liberal governments. In the field of Criminal law, one of the clearest signs of their success was the process of abolition of a large number of punishments, many of which had originated in Roman law, but had continued to be applied during the Ancien Régime.

Among the punishments which Enlightened authors had criticized, had been the death penalty (or at least its excessive use as a means of punishment), the confiscation of goods, the branding of the offender and his family with the juridical tag of *infamis* (as well as other transcendent penalties), and the use of torture as a way of obtaining evidence.

However, the most influential and decisive voices in the debate over the future of the power of the State to punish were not drawn from the writers

⁴⁴ Art. 305 Constitution 1812: “No penalty to be given, whatever the crime, should be transcendent in any term to the suffering family, but instead it will have its effect upon who that deserved it”.

⁴⁵ Babiano y Mora, J. Fernández Asperilla, A.: “Justicia y delito en el discurso liberal de las Cortes de Cádiz”, *Antiguo Régimen y liberalismo. Homenaje a Miguel Artola*. 2. Economía y sociedad. Alianza Editorial, Madrid, 1995, p. 395.

⁴⁶ Decreto CCXXV, de 22-II-1813, in *Colección de Decretos...*, vol II, pp. 766–767 (collected in the work BABIANO Y MORA/ FERNÁNDEZ ASPERILLA, “Justicia y delito en el discurso liberal de las Cortes de Cádiz”, ob. cit., p. 395).

⁴⁷ Masferrer, *Tradicón y reformismo en la Codificación penal española...* cit., p. 79.

of Criminal law doctrine but rather from the political sphere, as can be seen by the Liberal nature of the Cortes of Cádiz.⁴⁸

In 1776, Carlos III consulted the Consejo de Castilla through his Secretary of State “Don Manuel de la Roda.” The document shows the King’s concern for the same points of Criminal law that concerned the majority of writers about Criminal law doctrine at the time. The king exhibited some concern about several points such as the principle of proportionality between crime and punishment, the wisdom of maintaining, suppressing, or reducing the application of the death penalty, and the rationality of permitting torture as a means of obtaining evidence.

However, most of these intended reforms had no immediate effect but were rather the beginning of a long process that would eventually lead to change. In some cases this change would come far later than in others. There were significant differences in the Chronology of abolition in Spain of the death penalty, the confiscation of goods, the use of humiliating and degrading punishments and the use of torture as a means of securing evidence.

The Death Penalty

Despite the concerns shown by Carlos III in his correspondence with the Consejo de Castilla, the question of the death penalty was not finally settled until its abolition by the Spanish Constitution of 1978 (Article 15).⁴⁹

A number of humanitarian ideologists had attacked the death penalty, throughout the Enlightenment, but without success.

I do not wish to enter into a discussion about why their attempts at reform failed. It is sufficient to note that not all Enlightenment thinkers were in agreement on this point as is shown by the divergence of opinion between Lardizábal and Beccaria.

The Confiscation of Goods

As it came to be accepted that the transcendent effects of punishments should be abolished, it followed naturally that there should be considerable opposition to a type of punishment that necessarily affected third parties who had taken no part in the commission of the crime, such as the confiscation of goods.⁵⁰ This type of punishment was expressly abolished by the

⁴⁸ Babiano y Mora / Fernández Asperilla, “Justicia y delito en el discurso liberal de las Cortes de Cádiz”, ob. cit., pp. 387–397.

⁴⁹ On the legal development of the death penalty in Spain, see Sainz Guerra, *La evolución del Derecho penal en España*, pp. 273–288.

⁵⁰ For a wide ranging history of this institution, from its origins to its abolition in nineteenth century peninsular law, see PINO ABAD, Miguel: *La pena de confiscación de bienes en el Derecho histórico español*. Córdoba, 1999; on the legal development of the

Constitution of Cádiz,⁵¹ and this express prohibition was repeated in successive Spanish Constitutional texts, following the European tendency⁵² to prohibit this punishment.⁵³ Despite a certain degree of anti-Enlightenment feeling and the existence of a minority opposed to the abolition of the confiscation of goods,⁵⁴ the Cortes of Cádiz did not hesitate to bring an end to the practice.

Their reasons for doing so have been recorded for posterity, “It is not just that punishments should be extended to affect the innocent descendant and the honourable family member.”⁵⁵

This punishment therefore did not need to be removed by the codification process as it had already been eradicated from the Spanish legal system thanks to previous political and Constitutional reforms inspired by the Enlightenment.⁵⁶

Humiliating Punishments

The excessively humiliating and degrading nature of many punishments was criticised by contemporary thinkers, but it was not until the latter part of the nineteenth century that this rejection became widespread

death penalty in Spain, see also SAINZ GUERRA, *La evolución del Derecho penal en España*, pp. 349–352.

⁵¹ Art. 304 Constitution 1812: “Neither will the penalty of the confiscation of goods be applied”.

⁵² German constitutionalism is a good example of this tendency, as can be seen from a reading of Section 16 Constitution of Baden (1818), Section 105 Constitution of Hessen (1820), Section 128 Constitution of Kurhessen (1831) and the Prussian Constitution (Section 9 de la *oktrojierte Verfassung*, 1848 and Section 10 *revidierte Verfassung*, 1850). Although nowadays almost all Constitutions have stopped explicitly expressing this prohibition, it can still be found in that of Luxembourg (art. 17: “The penalty of confiscation cannot be applied”).

⁵³ Art. 10 Constitution 1837; art. 10 Constitution 1845; art. 12 Constitution *non-nata* (1856); the 1869 Constitution did not contain an express prohibition of applying the punishment of the confiscation of goods, although it could be implicitly deduced from art. 13; art. 10 Constitution 1876; art. 44 in fine Constitution 1931; the current Constitution does not contain any precept which expressly prohibits the confiscation of goods. However, in the fiscal field and not in the field of criminal law-, art. 31.1 establishes that: “All people shall contribute to the payment of public expenses in accordance with their economic capabilities (...) that shall not under any circumstances involve the confiscation of goods”.

⁵⁴ Egido, Teófanos: “Los anti-ilustrados españoles”, *La Ilustración en España y Alemania*. Barcelona, 1989; the contrary current I refer to is also referenced in Gutiérrez, *Práctica criminal de España*, volume III, chapter 6, 103.

⁵⁵ *Diario de Sesiones de las Cortes Generales y Extraordinarias. Legislatura de 1810 a 1813*. Madrid, 1870, tomo IV, 437, p. 2419; PINO ABAD, *La pena de confiscación...* cit., pp. 392 and 406; Alonso Romero, M^{te} Paz: Aproximación al estudio de las penas pecuniarias en Castilla (siglos XIII–XVIII), *AHDE* 55 (1985), p. 14.

⁵⁶ Masferrer, *Tradicón y reformismo en la Codificación penal española ...* cit., p. 81.

enough and received enough political support for measures to be taken that would prohibit punishments and forms of executing sentences that were particularly humiliating.

The Ancién Regime had frequently applied these types of humiliating punishments, but their application had varied from kingdom to kingdom across the Peninsula.⁵⁷ The *Discurso sobre las penas* by Lardizábal gives a fair indication of the diverse types of corporal punishment that were in force, mentioning both mutilations and whippings and describing the effects of physical punishments on prisoners as well as the instruments with which these punishments were carried out.⁵⁸

While Beccaria had written about the general need to soften punishments,⁵⁹ Lardizábal expresses his opinion about each one of the penalties he describes. He expresses his total disagreement with the practice of mutilation,⁶⁰ but considers whipping to be a valid form of punishment if applied with “a great deal of prudence and discernment.”⁶¹ He supports public humiliations as long as they do not offend against standards of “shame and decency,”⁶² and suggests that prisons ought to be replaced by houses of correction, except where the criminal is shown to have “an absolutely perverted will.”⁶³

Lardizábal appeared to be completely convinced about the “healthy effects” that these types of punishment produced; he did however recognise that an arbitrary and imprudent use of these penalties would have negative effects. He felt that in these cases, those that suffered these punishments could lose the minimum degree of self esteem and dignity that was necessary for their mental stability and the positive development of their character. Lardizábal chooses as an example of this imprudent use of penalties the punishment that the “Fuero Juzgo” (Spanish legal text of thirteenth century) imposed for the crime of sodomy, although this penalty had in fact fallen into disuse.

This was not the only example of an extremely cruel punishment that had effectively been abolished through disuse. It was not that these conducts went unpunished but rather that judges, when faced with a penalty that was disproportional to the crime it was intended to punish, chose to apply other penalties that better reflected the mentality of the times.

Together with these degrading and humiliating punishments was the penalty of branding people with the juridical category of infamis. This

⁵⁷ For a wider ranging study of this topic, see Masferrer, *Tradición y reformismo en la Codificación penal española* . . . cit., pp. 81–86.

⁵⁸ Lardizábal, *Discurso sobre las penas*, cap. V, III.

⁵⁹ Beccaria, *De los delitos y de las penas*, cap. 27.

⁶⁰ Lardizábal, *Discurso sobre las penas*, cap. V, III, 1–6.

⁶¹ Lardizábal, *Discurso sobre las penas*, cap. V, III, 10.

⁶² Lardizábal, *Discurso sobre las penas*, cap. V, III, 10.

⁶³ Lardizábal, *Discurso sobre las penas*, cap. V, III, 16.

punishment had existed since Roman times, and it was still in use at the beginning of the Constitutional era, and was typified as a punishment in the Criminal Code of 1822.⁶⁴

The need to soften punishments was self evident, but introducing effective measures to soften them was more complex. The philosophy of utilitarianism as expounded by Bentham and the idea of prevention by intimidation actually encouraged the humiliating effect of certain punishments and their process of execution. It has been noted that “in the field of Criminal law there was not a total break with the past. During the initial stage of Liberalism under the Cortes of Cádiz there were certain signs of continuity with respect to the Ancién Régime.”⁶⁵ The idea of making an example of the accused required that punishments received a degree of publicity and was a sad continuation of the principles of the old political regime within a Liberal system guided by modern enlightenment philosophy.

There was a break with the Ancién Régime with respect to certain punishments such as whippings, which were banned by the Cortes of Cádiz in 1813,⁶⁶ but there again it has been pointed out that “the disappearance of this punishment was due more to the fact that it had fallen into disuse than to any legal dispositions.”⁶⁷ Other punishments that were designed to humiliate the miscreant would be gradually phased out over the course of the codifying process.

3.2.2.5 The Abolition of Torture as a Means of Obtaining Evidence

The express abolition of torture as a means of obtaining evidence or confessions from prisoners, a centuries old practice,⁶⁸ was another clear example

⁶⁴ Concerning the abolition of this penalty in Spanish law, see Masferrer, *La pena de infamia en el Derecho histórico español*. . .cit., pp. 373 ff.; and by the same author: “La pena de infamia en la Codificación penal española”, *Ius fœgit. Revista interdisciplinar de estudios histórico-jurídicos* 7 (1998), pp. 123–176; on the Criminal Code of 1822, see Sainz Guerra, Juan: “José María Calatrava o la Codificación penal a comienzos del siglo XIX”, in *Estudios de Historia de las Ciencias Criminales en España* (J. Alvarado y A. Serrano Maíllo, eds.). Madrid, Dykinson, 2007, pp. 351–384.

⁶⁵ Babiano y Mora/Fernandez Asperilla, “Justicia y delito en el discurso liberal de las Cortes de Cádiz”, ob. cit., p. 396.

⁶⁶ Babiano y Mora/Fernandez Asperilla, “Justicia y delito en el discurso liberal de las Cortes de Cádiz”, ob. cit., p. 394; about the period of validity and the application of the lash in the Modern Age, as well as its definitive abolition, see the research of ORTEGO GIL, Pedro: “Algunas consideraciones sobre la pena de azotes durante los siglos XVI–XVIII”, *Hispania*, LXII/3, nm. 212 (2002), pp. 849–906; for the first formal abolition of this penalty by Parliament (1813), see ORTEGO GIL, “Algunas consideraciones sobre la pena de azotes. . .cit., p. 903).

⁶⁷ ORTEGO GIL, “Algunas consideraciones sobre la pena de azotes. . .cit., p. 903.

⁶⁸ For detailed exposition and a bibliography on this matter, see Masferrer, *Tradicón y reformismo en la Codificación penal española* . . . cit., pp. 86–89; same author: “La

of a political-criminal law reform that was carried out before the beginning of the codification process. I do not feel it is necessary to examine this point in detail as there already exists abundant literature on the subject, nor do I consider it useful to provide a summary of the opinions held by jurists both in favour of and against the practice in the years directly preceding its abolition. For this reason, I shall not reproduce here the lengthy debate between Alfonso María Acevedo and Pedro de Castro on this question.⁶⁹

In Spain Lardizábal echoed the arguments put forward by Beccaria,⁷⁰ showing his total rejection of the practice, a practice that was extremely common during the Ancien Régime. Both authors called for its abolition,⁷¹ and this attitude towards torture was expressed in many different countries, sometimes even before the criticisms of Beccaria.⁷²

The first Spanish legal text to abolish torture was the Constitution of Bayonne (1812, article 133),⁷³ and a few years later the Cortes of Cádiz approved a decree for the abolition of torture during a session held on the 22nd of April 1811. The essential content of this decree was reiterated rather succinctly in Article 303 of the Constitution of 1812 that stipulated that “Neither torture nor harassment shall be employed.”

In the period directly before the start of the codification process, a number of reforms in Criminal law were carried out, having been both proposed and defended by Enlightenment thinkers. However, the abolition of torture and these other reforms would have been unthinkable without the triumph of the Liberal revolution. This is shown quite clearly by the fact that the

historiografía penal española del siglo XX. Una aproximación a sus principales líneas temáticas y metodológicas”, footnote 292.

⁶⁹ Acevedo, Alfonso María: “De reorum absolute abiecta crimina negantium apud equuleum...” (Madrid, 1770), later translated and published under the title *Ensayo acerca de la tortura o cuestión de tormento; de la absolución de los reos que niegan en el potro los delitos que se les imputan, y de la abolición del uso de la tortura, principalmente en los tribunales eclesiásticos* (Madrid, 1817); De Castro, Pedro: *Defensa de la tortura y Leyes patrias que la establecieron, e impugnación del Tratado que escribió contra ella el Dr. Alfonso María Acevedo y su autor D. Pedro de Castro* (Madrid, 1778).

⁷⁰ Lardizábal, *Discurso sobre las penas*, pp. 266–267.

⁷¹ I do not share the opinion of Saldaña (“Historia del Derecho penal en España”, *Tratado de Derecho penal*, de Franz von Liszt, Madrid, 1926, p. 412), who states that «Lardizabal also copies from Beccaria and quotes Montesquieu. It is the least interesting part of his book». Lardizabal tackled this penalty with more accuracy and depth than Beccaria.

⁷² Jerouschek, Günter: “Thomasius und Beccaria als Folterkritiker. Überlegungen zum Kritikpotential im kriminalwissenschaftler Diskurs der Aufklärung”, *ZStW* 110 (1998) Heft 3, pp. 658–673; in the opinion of Jerouschek, Beccaria’s argumentative discourse against torture not only lacked originality, but it could possibly have been copied from the works of previous authors.

⁷³ «Torture is abolished; any severity or force that might be employed in the act of imprisonment or in the arrest and execution of the penalty which is not authorised by law is a crime».

protests against torture raised during the reign of Carlos III were ignored, and that the King, while having the power to abolish torture, chose not to do so, thus proving himself to be “an absolute Monarch rather than an enlightened one.”⁷⁴

These criticisms were directed against the use of torture and not against the whole system of Criminal law and trial procedure, but the fundamental reason for their lack of effect was that any criticism that did not accord with the tendencies and power structures of the Ancién Regime was ineffective.⁷⁵ As the very system and mentality of the absolutists contributed decisively to the degradation of legal guarantees in criminal proceedings,⁷⁶ it is easy to see to why these criticisms would remain ineffective until radical political reforms took place.

Only when the Liberal revolution managed to change the existing political order did it become possible to carry out reforms in Criminal law that corresponded to Enlightenment principles. The practice of torturing prisoners had fallen into disuse from the second half of the eighteenth century onwards, and for that reason the Cortes of Cádiz had no difficulty in abolishing the practice definitively.⁷⁷

⁷⁴ Masferrer, *Tradición y reformismo en la Codificación penal española...*, pp. 87–88; Tomás y Valiente, “La última etapa y la abolición de la tortura judicial en España”, en *La tortura en España*. Second edition. Madrid, 1994, p. 135.

⁷⁵ I only partially agree with Tomás y Valiente when he says that «if the arguments against torture that were made during the sixteenth, and seventeenth centuries, and in the first half of the eighteenth century, were not able to achieve the abolition or even the simple reform of this institution, it was because they were only addressed against this institution, and not against the whole procedural system of criminal law in which torture was a basic and constitutive part» (Tomás y Valiente, “La última etapa y la abolición de la tortura judicial en España,” p. 123).

⁷⁶ Ferro Pomà, Víctor: *El Dret Públic Català. Les institucions a Catalunya fins al Decret de Nova Planta*. Vic, 1987, p. 375, nota 381.

⁷⁷ Babiano y Mora/Fernández Asperilla, “Justicia y delito en el discurso liberal de las Cortes de Cádiz,” ob. cit., pp. 393–394.