

## Criminal Law Reform in the Eighteenth Century Europe. A Comparative Study: England, France, Spain.

**Isabel Ramos Vázquez**

Professor of Legal History

Faculty of Social and Legal Sciences

University of Jaén

Campus Las Lagunillas, s/n, 23071, Jaén (Spain).

### Abstract

*The Old Regime penology is symbolized by “the spectacle of suffering”, but all over Europe there are increasing evidences that the chronology of the decline of corporal punishment and the growing of “secondary punishments” is very different from that suggested by traditional literature. In working toward a broader understanding of the factors shaping the development of moderation of punishment and the criminal reform as a whole, this article tries to make a comparative study of the doctrines, principles and practices that guided the prosecution of criminal offenses in the eighteenth century England, France and Spain, just before Revolution.*

**Keywords:** Criminal law reform. Punishment. Eighteenth century. Humanism. Individualism. Rationalism.

### 1. INTRODUCTION

The interest in criminal issues has had little scholarly attention till Michael Foucault published his well-known study about criminal justice at the end of the Old Regime<sup>1</sup>. Then, the subject has started to be faced with determined interest in several European western countries, coming to relevant conclusions particularly in England<sup>2</sup> and France<sup>3</sup>. Spain is also joining this tendency, though a better effort should be requested in order to get greater results<sup>4</sup>.

<sup>1</sup> Foucault, M. (1975), *Surveiller et punir: naissance de la prison*, Paris.

<sup>2</sup> Radzinowicz, L. and Hood, R. (1948-1986), *A History of english law and its Administration from 1750*, 5 vols, London; Radzinowicz, L. and Turner, L.W.C. (Eds.) (1945), *The modern approach to criminal law. Collected essays*, London; Spierenburg, P. (1984), *The Spectacle of Suffering*, Cambridge; A. Platt, A., and Takagi, P. (1980), *Punishment and penal discipline*, Berkeley; Cockburn, J.S. (1972), *A history of English Assizes*, Cambridge; Lagbein, J.H. (1974), *Prosecuting crime in the Renaissance*, Cambridge; Beattice, J.M (1975), *Albion’s fatal tree*, London, and *Judicial records and the measurement of crime*, in Knafla, L.A. (Ed.) (1980), *Crime and Criminal Justice in Europe and Canada*, Waterloo, 127-145; Sharpe, J.A. (1984), *Crime in early modern England*, London; Green, T.A. (1985) *Verdict According to Conscience: perspectives in the English Criminal Trial by Jury 1200-1800*, Chicago; Gatrell, V.A.C. (1994), *The hanging tree: execution an the english people 1770-1868*, Oxford; Knafla, L.A. (Ed.) (1990), *Crime, police and the Courts in British History*, Westport, London; King, P. (2000) *Crime, Justice and Discretion in England.1740-1820*, Oxford; or Hostetter, J. (2009) *A History of criminal justice in England and Wales*, Hampshire.

<sup>3</sup> Imbert, T. and Levasseur, G. (1972), *Le pouvoir, les juges, le bourreau*, Paris ; Laingui, A. (1993), *Histoire du droit pénal I. Le droit pénal*, Paris. Cujas, 2<sup>a</sup> ed.; Casas Fernandez, M. (1931), *Voltaire criminalista*, Madrid; Andrews, R.M. (1994), *Law, magistracy, and crime in Old Regime Paris. 1735-1789. vol.I. The system of criminal justice*, New York; Doyle, W. (1995), “Reforming the Criminal law at the end of the Old Regime: the example of president Dupaty”, in *Officers, nobles and revolutionaries. Essays on eighteenth-century France*, London, pp.155-161; Badinter, R. (Ed.) (1989), *Une autre justice. 1789-1799*, Paris; Rousseaux, X., Dupont-Bouchat, M.S., and Vael, C.L (Eds.) (1999), *Révolutions et justice pénale en Europe. Modèles français et traditions nationales. 1780-1830*, Paris; Kingston, R. E., (2003), “Criminal Justice in Eighteenth-Century Bordeaux. 1715-24 », in Knafla, L.A. (Ed.), *Crime, punishment, and reform in Europe*, Greenwood Press, Westport, Conn (U.A) pp.1-38; Carbasse, J.M. (2000), *Histoire du droit pénal et de la justice criminelle*, Paris; Garnot, B. (2000), *Crime et justice aux XVII et XVIII siècle*, Paris; or Berger, E. (2008), *La justice pénale sous la Révolution. Les enjeux d’un modèle judiciaire libéral*, Rennes.

<sup>4</sup> Tomás y Valiente, F. (1969), *El derecho penal de la monarquía absoluta (siglos XVI, XVII y XVIII)*, Madrid; Masferrer, A. (2003), *Tradición y reformismo en la Codificación penal española*, Jaén; Sainz Guerra, J. (2004) *La evolución del derecho penal en España*, Jaén; or Alvarado J. and Serrano, A. (Eds.) (2007), *Estudios de Historia de las Ciencias Criminales en España*, Madrid.

To the traditional theory about a pre-Beccaria era and a new later movement which would promote the humanitarian reform for criminal law, and the transition between corporal penalties and the growing predominance of imprisonment, one may wonder if there were not previous changes or movements that widened the way to welcome Beccaria's ideas, and tried some different penalty modes before designing and establishing our present prison system: "*The history of penology may well represent a move from the gallows to the prison; but there were important intervening stages that require explanation*"<sup>5</sup>. Evidences of such precedents may be found in the whole of Europe. But this study, as aforementioned, will contemplate only the cases of England, France and Spain. A humanistic or philanthropic movement promoted the change in the three countries (probably deepest in Spain). There also existed important precedents of a new utilitarian policy that affected penal justice. And last, there should be highlighted the development of the new philosophy of rationalism, which focused on individualism and humanism, and which finally confused the criminal reform with the Revolution.

## **2. THE MOVEMENT FOR REFORM IN ENGLAND.**

England was pioneer, not only because of its industrial and economic development<sup>6</sup>, but also because after a period of strong religious struggles, some freedom started to be noticed as well as an important change in the consideration of law as something subjective. A century before the Revolution spread over the continent, the Glorious Revolution had already taken place in England, resulting in the Bill of Rights, dated on 13<sup>th</sup> February 1689, and the liberal and guaranteed criminal proceeding, unknown in the rest of Europe. Moreover, although death was still the usual penalty, England was also pioneering in the application of secondary punishments, and started a policy of convict's transportation to the colonies for agricultural or building labour since the early Modern Age.

The question has been properly studied by English literature, reaching the conclusion that in the sixteenth and seventeenth century transportation was regularly recurred to, mainly for habitual offenders. For qualified offenders, capital punishment, sometimes aggravated which has been defined as 'the spectacle of suffering', was still preferred. Only habitual offenders and vagrants were transported to the colonies, since in England there were not galleys like in Spain and France<sup>7</sup>. Rusche and Kirchheimer have dated the beginning of English transportation in the Act against vagrancy in 1597 (*An Act for Punishment of Rogues, Vagabonds and Sturdy Beggars*)<sup>8</sup>.

Penal slavery started earlier in England than in the rest of the European countries, but it also finished earlier. By the mid-eighteenth century American colonies were not able to count on more prison population. Their representatives complained publicly about taking the worst in society, and finally the colonies were set free of this obligation. Then, eyes were set upon Australia, but convicts began to be sent there only at the beginning of nineteenth century, so there was a period in which the main secondary punishment was not efficient in England<sup>9</sup>, while the imprisonment was just a project. Imprisonment already became to be considered a 'secondary punishment' for the way it was used at the end of the Old Regime.

---

<sup>5</sup> Jenkins, P. (1990), "From gallows to prison? The execution rate in Early modern England", in Knafla, L.A. (Ed.), *Crime, police and the Courts in British History*, London, p.146. See also Rusche, G., and Kirchheimer, O. (1939), *Punishment and social structure*, New York; Pike, R. (1984), "Penal practices in early modern Spain", in *Criminal Justice History*, 5, pp.45-56; Melossi, D., and Pavarini, M. (1980), *Cárcel y fábrica. Los orígenes del sistema penitenciario (siglos XVI-XIX)*, Buenos Aires; Rothman, D.J. (1971), *The discovery of the asylum*, Boston; Smith, D. (1990), "The demise of transportation: Mid-Victorian penal policy", in Knafla, L.A. (Ed.) (1990), *Crime, police and the Courts in British History*, London; Adams, T.M. (1990), *Bureaucrats and Beggars. French Social Policy in the Age of the Enlightenment*, Oxford; or Pavarini, M. (2003), *Control y dominación. Teorías criminológicas burguesas y proyecto hegemónico*, Buenos Aires.

<sup>6</sup> Radzinowicz and Hood (1948-1986), *A History of English law and its Administration...*, vol.5, p.214.

<sup>7</sup> Dunn, S.S. (1973), *Sugar and slaves: the rise of the planter class in the English West Indies. 1624-1713*, London; Rusche and Kirchheimer (1939), *Punishment...*, p.135; Jenkins (1990), "From gallows to prison?"..., pp.129-149; or Smith (1990), *The demise of transportation...*, pp.241-265.

<sup>8</sup> The assistance to the truly poor in England was channeled mainly through a system of public financial support ("public relief) to be given directly to needy families, compared to other European experiences, for example in France and Spain, that involve the creation of custodial and care places, such as hospitals or houses of correction. See Webb, W. and B. (1910), *English poor law policy*, London.

<sup>9</sup> It is estimated that, while those sent to America in the eighteenth century were about 30.000 men, Australia had come in less time some 163.000 men, in Radzinowicz and Hood (1990), *The Emergency of Penal Policy in Victorian and Edwardian England*, Oxford, p.468.

But in fact it did not have that use: the ancient prison was just the place where defendants were confined for trial and judgment until they were either acquitted and released or sentenced to various punishments<sup>10</sup>. Only Ecclesiastical jurisdiction used it as a penalty thus since memorial times, and the corrective purpose that canon law gave to this punishment was an important precedent for its development<sup>11</sup>. So they saw in England men like Thomas More or Francis Bacon, and also Coke, George Fox or Bishop Jeremy Taylor. Like the Spanish theologians Diego de Covarrubias or Alfonso de Castro, all of them defended the need for more humanitarian punishments, following a proportionality criterion between crimes and punishments, and restricting death punishment, mainly in crimes against property<sup>12</sup>.

The efforts of the humanitarian movement in the Modern Age finally achieved the creation of special precaution destinations for the poor or potential offenders<sup>13</sup>. Prisons started to be used also to retain and punish habitual offenders, together with other kind of arrested in custody or prevention, and with debtors arrested until they paid their debts. It was a really chaotic spectacle inside as well as outside prisons and jails, as there were lots of them, belonging to different jurisdictions, and sometimes mixed with other kinds of preventive stores<sup>14</sup>. Old Regime's prisons characterized by a miserable and unhealthy atmosphere, as it were shown by the English philanthropist John Howard at the end of the eighteenth century. Geoffrey Mynshull had already denounced the horror in English prisons at the beginning of the seventeenth century<sup>15</sup>, and a *Society for Promoting Christian Knowledge* was created with the aim, among others, of visiting prisons to help the arrested. Even a parliamentary commission, the Commission of Inquiry, made a report about the situation in the prisons, proposing its improvement in 1729<sup>16</sup>. But none of these initiatives had the influence of Howard's work, *The State of the Prisons in England and Wales* (1777).

If Beccaria has been considered the father of the modern criminal science, Howard has transcended History as the creator of penitentiary law<sup>17</sup>. He was not a revolutionary, just a philanthropist<sup>18</sup>, and promoted the reform in prisons giving relevance, for the first time in History, to the offender, anticipating a subjective vision of criminal law<sup>19</sup>. Howard's friends Samuel Whitbread tried to take his ideas to Parliament during the twenty-two years he was a representative in the House of Commons. Howard himself was heard in House of Commons when Alexander Popham presented two bills about the prison reform<sup>20</sup>. But the first serious attempt for reform was the Penitentiary Act project of 1779, that Howards supported, finally unsuccessful<sup>21</sup>. Although he has been acknowledged just for his prison work, Howard agreed also to a deeper revision of the punitive system. He stated against the public execution of capital punishment in England, and also supported the new thesis by William Blackstone and William Eden about the whole reform of criminal law<sup>22</sup>.

<sup>10</sup> Peters, E.M. (1995), "Prison before the prison. The Ancient and Medieval Worlds", in Morris, N., and Rothman, D., (Eds.), *The Oxford History of the Prison*, pp.25-26.

<sup>11</sup> Merle, R. (1985), *La penitence et la peine; théologie, droit canonique, droit pénal*, Paris, p.64.

<sup>12</sup> Costa, F. (1928), *Delitto e pena nella storia del pensiero umano*, Turín; Blasco, F. (1945), *Tomás Moro criminalista*, Buenos Aires; Jiménez de Asúa, L., "Tomás Moro criminalista, según Francisco Blasco", in *El Criminalista*, t. IV, pp.65-71; or Radzinowicz, *The movement for Reform...*, pp.259-267.

<sup>13</sup> In France appeared Hospitals, in England Houses of Correction or Work-houses, in Holland the Ras-puis, Zuchtäusen in Germany, and in Spain the "Casas de Misericordia" o "Casas de Arrepentidas". See Melossi and Pavarini, *Cárcel y fábrica...*, p.33, and Trinidad Fernández, P. (1991), *La defensa de la sociedad. Cárcel y delincuencia en España (siglos XVIII-XX)*, Madrid, p.29.

<sup>14</sup> Spieremburg, P. (1995), "The body and the State. Early Modern Europe", in *The Oxford History...*, pp.58-59.

<sup>15</sup> Mynshull, G. (1618), *Essays and Character of a Prison and Prisoners*, London.

<sup>16</sup> McGowen, R. (1995), "The Well-Ordered Prison. England, 1780-1865", in *The Oxford History...*, p.71.

<sup>17</sup> Cuello Calón, E. (1958), *La moderna penología (Represión del delito y tratamiento de los delincuentes. Penas y medidas. Su ejecución)*, Barcelona, pp.306-308; Fontán Balestra, C. (1964), *Derecho penal*, Buenos Aires, p.81; Garrido Guzmán, L. (1976), *Compendio de ciencia penitenciaria*, Valencia, p.56. S; or García Ramírez, S. (2003), "John Howard: la obra y la enseñanza", in *El estado de las prisiones en Inglaterra y Gales*, México, pp.49-50.

<sup>18</sup> Quirós, B. de (1898), *Las nuevas teorías de la criminalidad*, Madrid, p.242.

<sup>19</sup> Salillas, R (1888), *La vida penal en España*, Madrid, p.77.

<sup>20</sup> Dixon, H. (1852), *John Howard and the Prison-World of Europe. From Original and Authentic Documents*, Webster, Mass, p.198.

<sup>21</sup> McGowen, R. (1995), *The Well-Ordered Prison...*, p.80.

<sup>22</sup> Howard, J., *Informe especial sobre las prisiones inglesas*, p.405, n.5., cfr. García Ramírez, S. (2003), *John Howard: la obra y la enseñanza...*, p.20.

Much before Beccaria's work, Sollom Elym also requested a complete reform of the criminal justice system in England, in his work *State Trials* (1730), and in response to these new ideas the House of Commons appointed two interesting Committees, in 1750 and 1770, to inquire into the state of criminal laws. It was then that for the first time punishment humanization was talked about in Parliament. In 1783, the main place of execution in London was transferred from Tyburn to an open, further space in front of Newgate prison. Thus, the macabre procession preceding executions was finished, and executions gained little dignity or solemnity. The next attempt to reform the whole criminal legislation took place in 1787<sup>23</sup>, having increased social sensibleness<sup>24</sup>. Thomas Paine and Edmund Burke were faced in defence of the different systems of punishment<sup>25</sup>, and the great promoters of English criminal reform appeared: Willian Eden, Samuel Romilly, James Mackintosh, Thomas Fowell Buxton, Robert Peel and Jeremy Bentham.

Willian Eden did only report his ideas in a well-known work based on Montesquieu and Beccaria's ideas<sup>26</sup>. Samuel Romilly first began supporting the reform by replicating Madan's work<sup>27</sup>, and wrote numerous letters, speeches and treaties about the question, transcending History as the main English reformer<sup>28</sup>. His proposals were related to alleviate the severity of criminal law, and his achievements in the Parliament widened the way later continued by James Mackintosh, Thomas Fowell Buxton, or Robert Peel, who in 1819 got the appointment of special Committee in Parliament to study the revision of the Criminal Code<sup>29</sup>. Robert Peel continued to promote most of the reforms in the twenties, based on an effective police system and procedural changes that searched for a great efficiency in justice administration. The cruel 'Waltham Act' was derogated in 1823 thanks his work, and statutes about larceny, forgery, and allies offences or malicious injuries to property or against the person were also reformed. Finally, he strongly bet for a development of transportation (that started to be addressed to Australia), and promoted the prison reform<sup>30</sup>.

Nevertheless, the most recognized English reformer was not Robert Peel, whose work did not transcend frontiers, but the philosopher and jurist Jeremy Bentham, whose criminal theory transcended the world. Sometimes, Bentham's criminal utilitarianism has been directly related to the so called Classical School of Voltaire and Beccaria<sup>31</sup>. But, although these had mentioned utility as a basic principle, Bentham's utilitarianism abounded in the idea of prevention as a social defence, and to the "general prevention" added a "special prevention" aimed to correct the offenders. Bentham left metaphysics aside and centred on common sense and practice<sup>32</sup>. He thought the Old Regime principles were 'irrational', but he did not intend to modify them radically<sup>33</sup>. Utility was his fundamental principle in order to get public happiness. He created an 'exhaustive' method able to be applied to moral sciences<sup>34</sup>. Utilitarianism was, in this sense, a continuation of the classical English empirics of Locke, Berkely and Hume, but adapted by the Enlightenment ideology<sup>35</sup>.

<sup>23</sup> Pike, L.O. (1873-1876), *A History of crime in England illustrating the changes of the laws in the progress of civilisation*, Patterson Smith, Montclair, Nueva Jersey.

<sup>24</sup> Davis, M.T. (2003), "I can bear punishment": Daniel Isaac Eaton, Radical Culture and the Rule of Law, 1793-1812", in *Crime, punishment, and reform in Europe...*, pp.89-106.

<sup>25</sup> Paine, T. (1791), *The Rights of man*, translated by Fontanilla, J.A. (1962), *Los derechos del hombre*, Buenos Aires; and Burke, E. (1790), *Reflexions on the Revolution of France*, translated by the Instituto de Estudios Políticos (1963), *Reflexiones sobre la Revolución francesa*, Madrid.

<sup>26</sup> Eden, W. (1771), *Principles of penal law*, London.

<sup>27</sup> The work of the tradicionalist Madan, M. (1785), *Thoughts on executive justice, with respect to our criminal laws, particularly on the circuits, dedicated to the judges of Assize*, London, was attacked by S. Romilly, S. (1785), *Observations on a late publication, intituled Thoeghts on Executive Justice*, London, and also by Perryn, R. (1785), *Charge given to the Grand Jury for the county of Sussex at he lent Assizes*, London.

<sup>28</sup> His best known work is Romilly, S. (1810), *Observations on the criminal law of England as it relates to capital punishment, and on the mode in which it is administered*, London.

<sup>29</sup> Radzinowicz, *The movement for Reform...*, p.532.

<sup>30</sup> Webb, S. and B. (1963), *English prisons under local government*, 1922, reprint London, 1963.

<sup>31</sup> Gutiérrez Fernández, B. (2003), *Examen histórico del Derecho penal*, Madrid, 1866, fac. in Pamplona, 2003, p.380, or Casas Fernández, M. 81931), *Voltaire criminalista...*, p.112.

<sup>32</sup> Stuart Mill, J. (1993), *Bentham*, London, 1838, transl. in Madrid, 1993, p.9.

<sup>33</sup> Rodríguez Gil, M. (1981), *Introducción*, in J. Bentham, *Tratados de legislación civil y penal*, Madrid, p.9.

<sup>34</sup> Dinwiddy, J. (1995), *Bentham*, Madrid; or Rosen, F. (2007), *Jeremy Bentham*, London. Also the project [www.ucl.ac/uk/Bentham-Project](http://www.ucl.ac/uk/Bentham-Project).

<sup>35</sup> Goicoechea, H. (2005), "La Ilustración, Bentham y su traducción al castellano", in *Teoría de las ficciones*, Madrid, p.10.

In criminal law, he proposed a ‘political arithmetic’ where punishments were proportional to crimes. If people’s happiness was the only aim of the State, and justified its power to punish, crime prevention by means of proportional punishment was the only ‘useful’ means to get it. From this hypothesis, Bentham abounded in the meaning of proportionality, stating ‘the main rules of moral arithmetic’. Bentham’s classification of crimes and punishments followed the exhaustive method, supporting punishment individualisation and a subjective conception of law. According to this, circumstances of the crime were not the only fact to consider, but also other personal characteristics on the offenders (sex, age, social condition, moral and intellectual capacity, etc).

Besides this newer principle of individualisation, we have to highlight the defence of the so far residual imprisonment<sup>36</sup>. We cannot forget the new bourgeoisie preoccupation to find, among all the penalties known, the most suitable to the liberalism and capitalist. Noticed long ago the ineffectiveness of corporal punishment, the objective was to bring greater utility to the State, and also greater security to the citizens. The biggest contribution of Bentham was to develop imprisonment in the main punishment of utilitarianism.

Bentham distinguished between ‘simple prison’ (preventive or remand), and the so-called ‘afflictive or criminal prison’, different in duration or severity according to the fault and the offender’s condition. For a better effect, this type of imprisonment should imply some kind of work, service to the community or learning of a job. Afflictive prison was used to avoid the commission of new crimes (general prevention), but also to correct or reform the offender (special prevention) by means of the loneliness and the work. These achievements led Bentham to the elaboration of other of his main ideas: the offender’s isolation in individual cells. The so-called panoptic system (*El Panóptico*, 1791), was spread over Europe and inaugurated a new way to understand prison architecture.

### 3. THE MOVEMENT FOR REFORM IN FRANCE.

Although there is who deny the value of the literature as a source of scientific knowledge, one may necessary agree with the magnificent description of criminal justice by Dickens in *A tale of two cities*, comparing London and Paris in 1775. Both cities had a high and cruel criminality, and used very severe punishments, but unlike the English guarantee procedural and equity system, the French criminal justice appears to be characterized by chaos, arbitrariness and fanaticism, being the Bastille the main symbol of terror: ‘*Under the guidance of her Christian pastors*’, tells Dickens at the beginning of his work, ‘*she (France) entertained herself, besides, with such humane achievements as sentencing a youth to have his hands cut off, his tongue torn out with pincers, and his body burned alive, because he had not kneeled down in the rain to do honour to a dirty procession of monks which passed within his view, at a distance of some fifty or sixty yards*’

Dickens was reporting a real case happened in France, the one of the Chevalier de La Barre, who aroused the ire of Montesquieu or Voltaire, admirers of the English society. Events like these grew the black legend about the French Administration of criminal justice, and promoted, according to the traditional historiography, the criminal reform under the revolutionary ideals. Nevertheless, the French punishment system in the eighteenth century was not just terror. There was also a diversification in favour of the utility and the correction of the habitual or young offenders. We should not forget that it was the beginning of pre-capitalist society, and new kinds of productive punishments were being tried in all Europe, related to the men’s time as a means of work. In France galleys and bagnes were especially relevant, preferring to apply the force of work in the metropolis instead of the colonies<sup>37</sup>.

The French Mediterranean galley fleet, based at Marseilles, existed from at least the fifteenth century, though its main develop and institutionalisation did not occur till the seventeenth century, when the country reached its biggest hegemony and multiplied its naval potential. The galley at sea was adjudged to the same kind of vague and habitual offenders as in Spain, and also was used to commute other kind of corporal punishments<sup>38</sup>. Together with those sentenced to row the galleys, thousands of men every year, some of them were also sentenced to work in the Arsenal of Marseilles, to clean the place, bomb water, or hard building labours<sup>39</sup>.

<sup>36</sup> Monteverde, A. (1998), “Las cárceles y prisiones en la segunda mitad del siglo XVIII y comienzos del XIX. Aportes teóricos y penales de Jeremías Bentham”, in *Revista de Estudios Histórico Jurídicos de la Universidad de Valparaíso* (Chile), n.20.

<sup>37</sup> Andrews (1994), *Law, magistracy, and crime...*, vol.1, pp.316-383.

<sup>38</sup> Carbasse (2000), *Histoire du droit pénal...*, pp.266-267.

<sup>39</sup> Vigié, M. (1985), *Les galériens du roi. 1661-1715*, Paris, and Zysberg, A. (1987), *Les galériens: vies et destin de 60.000 forçats sur les galères du France. 1680-1748*, Paris.

With the decline in the number of serving galleys after the War of the Spanish Succession, at the beginning of the eighteenth century, labour in the Arsenal was made the principal form of punishment for most convicts. In 1748, Louis XV ordered that the hitherto autonomous galley fleet be placed under the full control of royal navy, which was based principally at Brest and Toulon, and the existing convicts were transferred from galleys to naval bagnes. The 1748 edict ended the galleys fleet (only a pair of them were kept to preserve 'glorious vestiges'), but not with the galleys system. Convict labour from ships, that had become useless, was simply shifted to other productive forms in land. Thus, two groups of buildings were built, walled and guarded, according to a new architecture based upon security and healthiness, with independent parts for work and accommodation, attached hospitals, and places to guard convicts, half a century before Bentham designed his famous panoptic system<sup>40</sup>.

On the other hand, the new policy to the mendicity was implemented in France with the creation of hospitals<sup>41</sup>; and in the absence of a "hospital-général", beggars were to be jailed in royal prisons. Problems resulting from their deterrence and confinement implied an increasing number of authorities, creating a special "policing beggary" and some new places for their enclosure: the "dépôts des mendiants"<sup>42</sup>. Also the jails adjacent to the courts started to keep convicts due to the lack of qualified prisons, such as the Bastille or Vincennes in Paris<sup>43</sup>. All of them were deficient and awful places, as well as galleys, bagnes, hospitals or "depot", and were fiercely criticized by philanthropists. But they were also the bases of the penitentiary regime, which in France counted as a precedent on the work by Jean Mabillon, written at the end of the seventeenth century but not published until 1724<sup>44</sup>.

Other changes were clearly seen in the French jurisprudence. There was a criticism to the criminal procedure since the seventeenth century<sup>45</sup>, but now, in the eighteenth century, there was also a criticism to punishments, like mutilations or brands, that judges stopped using<sup>46</sup>. Contributions like those by Bondonio, Ulrich, Durand, Mer or Kingston, based on the documental study of the Courts of Paris, Roussillon, Bourgogne, the Bretagne, or the Criminal Court of "La Tournelle" in the eighteenth century, show that French high courts were a common trend for the relative moderation in punishments and the humanitarian treatment towards the arrested. These judges based on a new better and more reliable police system, a new theory of legal proofs and the judicial reasoning, and on a new social mentality claiming for the reduction of torture and death penalty<sup>47</sup>. Another interesting example is the one of magistrate Dupaty, serving as advocate general, and subsequently president in the parliament of Bordeaux between 1768 and 1783<sup>48</sup>.

<sup>40</sup> Zysberg, A. (1980), *Politiques du bague. 1820-1850. L'impossible prison: recherches sur le système pénitentiaire au XIXe siècle*, Paris, pp.175-188; or Vigié, M. (1985), « Justice et criminalité au XVIIIe siècle: Le cas de la peine des galères », in *Histoire, Economie et Société*, 3, pp.352-363.

<sup>41</sup> Hufton, O. (1974), *The poor of Eighteenth Century France. 1750-1789*, Oxford; Schwartz, R. (1988), *Policing the Poor in Eighteenth-Century France*, University of North Carolina Press; Richard, E. (1889), *Histoire de l'hôpital de Bicêtre (1250-1791)*, Paris; or Boucher, L. (1883), *La Salpêtrière: Son histoire de 1656 à 1790*, Paris.

<sup>42</sup> McStay Adams, T. (1990), *Bureaucrats and Beggars. French Social Policy in the Age of the Enlightenment*, Oxford.

<sup>43</sup> Bongert, Y. (1983), « Quelques aspects de la prison au XVIIIe siècle », in *Etudes dédiées à la mémoire du Professeur Gérard Dehove*, Paris, pp.67-89.

<sup>44</sup> Mabillon, J. (1724), *Réflexions sur les prisons des ordres religieux*, in *Oeuvres posthumes*, Paris, vol. II, pp.321-335, which called for humane treatment to the offender to repair his fault, and developed a whole theory of prison as a place of regeneration and re-socialization.

<sup>45</sup> Carbasse (2000), *Histoire du droit pénal...*, p.354, noted in this question the work written in 1681 by the Parliament of Dijon's president, Augustine Nicolas, under the title "Si la torture est un moyen sûr à vérifier les crimes secrets".

<sup>46</sup> Carbasse (2000), *Histoire du droit pénal...*, p.365. See also Kaufmann, J. (1976), *The critique of criminal justice in eighteenth-century France: a study in the changing social ethics of crime and punishment*, Harvard University Press.

<sup>47</sup> Bondonio, P. (1928), « La torture dans le ressort du parlement de Paris aux XVIIIe siècle », in *Annales historiques de la révolution française*, 5, pp.322-337; Ulrich, D. (1972), « La repression en Bourgogne au XVIIIe siècle », in *Revue historique de droit français et étranger* (RHD), pp.398-437; Durand, B. (1979), « Arbitraire du juge et droit de la torture : l'exemple du conseil souverain de Roussillon », in *Recueil de mémoires et travaux publiés par la Société d'histoire du droit et des institutions* (SHDE), X, pp.141-179; Mer, L.B. (1985), « La procédure criminelle au XVIIIe siècle : l'enseignement des archives bretonnes », in *Revue Historique* (RH), n°555, pp.9-42; Pinson-Ramin, V. (1994), « La torture judiciaire en Bretagne au XVIIe siècle », in *Revue historique de droit français et étranger*, 72, pp.549-568; and Kingston, R.E. (2003), « Criminal Justice in Eighteenth-Century Bordeaux. 1715-24 », in *Crime, punishment, and reform in Europe...*, pp.1-38.

<sup>48</sup> Doyle, W. (1995), "Reforming the Criminal law at the end of the Old Regime: the example of president Dupaty", in *Officers, nobles and revolutionaries. Essays on eighteenth-century France*, London, pp.155-161.

There are also some other important reformers of the practice, as the president the Lamoignon, of the Paris parliament, and Servan, advocate-general at Grenoble and disciple of Voltaire.

However, the main promoters of French criminal reform were, undoubtedly, Rousseau and Montesquieu, who set the philosophical principles, and Voltaire, who applied those principles to the criminal practice removing social conscience, and preparing it to enthusiastically receive the later theory by Beccaria<sup>49</sup>.

It is said that Rousseau provided the movement with the political principles, and Montesquieu was the first to bring up in his writings some criminal considerations, though he was never a criminologist himself and his ideas arose from broader reflexions about the political society in general<sup>50</sup>. In his work *Lettres persanes* (1721), Montesquieu already criticized cruelty of punishments, as well as the Spanish Inquisition or the judges' arbitrariness<sup>51</sup>. But his most outstanding work was *Esprit des lois* (1748), where he asserted that criminal laws were not but the price every citizen had to pay to defend their freedom and security in the political community. The only purpose of punishment should be to prevent, so criminal law should be moderate and proportional.

Thus, criminal justice moved away from theology for the first time, and became just a human matter (humanitarianism or criminal individualism). Criminal laws were just useful by respecting individual freedom and security, so they should be certain, infallible and equal, providing the individual with a guarantee system. It was not Montesquieu but Voltaire who publicized these basic postulates of criminal reform. Voltaire's interest to reach the public opinion was shown firstly through a great number of dramatic works trying to create a new social conscience (*Henriada*, *Zaira*, *Alzire*, *Espartacus* or *Mahomet*)<sup>52</sup>. The unfair proceeding against Jean Calas in the Court of Tolosa, in 1762, offered him the opportunity to pronounce himself about the criminal question, starting a wide campaign to get a revision of it. The campaign awoke some interests, and produced new writings that spread the case throughout Europe<sup>53</sup>.

After the case of Calas, Voltaire was asked to take part in another unfair proceeding, that of the citizen Sirven<sup>54</sup>. Dupaty and Servan, advocates in the parliaments of Burdeux and Grenoble, supported Voltaire's opinions, becoming his most important collaborators. Some other writers appeared, like the Parisian lawyer Élie de Beaumont, to contribute to the movement. However, Voltaire's essays did not give yet a unified doctrine. His ideas appear to be somehow unconnected, but they can be summed up and understood according to the principles stated by Montesquieu, to whom he followed and admired. Voltaire also criticized the weakness of proofs, the lack of juridical guarantees, the inhuman treatment to the prisoners, the torture, the judges' arbitrariness, the very cruel penalties.... So, there is no doubt that Voltaire should have been one of the stronger bases for the later work of Beccaria<sup>55</sup>.

The first French translation of Beccaria's work, signed by Morellet, had terrible detractors, as Jousse, Serpillon, or Muyart de Vouglans, representatives of the old criminal school. But overall, the work was well recognized, and Beccaria was invited to Paris in the autumn of 1766. That same year, Voltaire produced his *Comments on the book 'About crimes and punishments' by a lawyer of provinces* (1766), where he basically added to Beccaria's thought, putting in order for the first time his own one<sup>56</sup>. Before writing his Comments, Voltaire had been visited by Morellet, and had been also strongly influenced by the proceeding of the Chevalier de La Barre<sup>57</sup>, that circulated around Paris and doubtless favoured the good reception of Beccaria's treaty.

<sup>49</sup> Hertz, E. (1887), *Voltaire und die französische Strafrechtspflege im achtzehnten Jahrhundert*, Stuttgart; Casas Fernández, M. (1931), *Voltaire criminalista...*, or Maestro, T.M. (1972), *Voltaire and Beccaria as reformers of criminal law*, New York.

<sup>50</sup> Graven, J. (1958), « Montesquieu et le Droit penal », in *La pensée politique et constitutionnelle de Montesquieu*, Paris, pp.210-254.

<sup>51</sup> Maestro, T.M. (1972), *Voltaire and Beccaria...*, p.23.

<sup>52</sup> Casas Fernández, M. (1931), *Voltaire criminalista...*, pp.35-40.

<sup>53</sup> Coquerel, A. (1886), *Jean Calas at sa famille*, Paris, or Maugham, F.H. (1928), *The case of Jean Calas*, London.

<sup>54</sup> Rabaud, C. (1858), *Sirven, étude historique sur l'avènement de la tolérance*, Paris, or Galland, E., *L'Affaire Sirven, étude historique d'après les documents originaux*, no place, undated.

<sup>55</sup> Casas Fernández, M. (1931), *Voltaire criminalista...*, p.95.

<sup>56</sup> Maestro, T.M (1972), *Voltaire and Beccaria...*, p.90.

<sup>57</sup> Chassigne, M. (1920), *Le Procès du Chevalier de La Barre*, Paris; D'Avray, M., *Le Procès du chevalier de La Barre*, Paris, undated, or Desers, L. (1922), *Le chevalier de La Barre : la légende et la réalité*, Paris.

Voltaire himself wrote to the Italian trying to join their efforts for reform<sup>58</sup>. But the answers from Beccaria were not as enthusiastic as Voltaire had wished.

On the contrary, Voltaire continued to write plenty of letters and pamphlets, and he implied personally in new judicial causes<sup>59</sup>. The movement got stronger in France and some prizes were organized about the subject, raising the works of Brissot de Wardille, Joseph-Elzéar-Dominique-Bernardi, Philippon de La Madeleine, or even Robespierre.

Apart from these and other awards in many European countries, in France there also appeared the works by Mirabeau, Lacretelle, Valazé, Turgot, Morelly, Buffon, Bergasse, Condoret, Linguet, Chaussard, Pastoret, Marmontel, or the honourable Marat. The encyclopaedists Diderot, D'Alembert or Jaucourt wrote also for the criminal law reform, and Manleón was the main responsible of taking these ideas to the National Assembly<sup>60</sup>. When in 1789 the bases for a new juridical order were established, the reformist principles of the criminal system emerged in the *Declaration of the Rights of Man and of the Citizen*<sup>61</sup>.

#### **4. THE MOVEMENT FOR REFORM IN SPAIN.**

Spain has always been considered to follow along behind other countries concerning the criminal reform. It is true that, whereas the first changes appeared in other countries, in Spain was enacted the obsolete "*Novísima Recopilación*" of 1805, which reproduced the same criminal structure develop since the Middle Ages.

However, we can also find important traces of change before Beccaria became a myth, and before Lardizábal introduced the ideas of the Classical School of Criminology. Such antecedents, like in other countries, had mainly a humanitarian and utilitarian origin, although there were some eminent jurists who soon started to import the new philosophy of rationalism.

Utilitarian penalty had already had its first experience during the government of the Austrians through the galleys, the forced work in the mines of "*Almadén*", and imprisonment in North African colonies. The galley punishment, existed from at least the Catholic monarchs reign,<sup>62</sup> became the main punishment in the sixteenth and seventeenth centuries in response to the increasing of the naval fleet<sup>63</sup>. The mines of "*Almadén*" were exploited since 1559 until 1800, occupying a great number of convicts as they were considered more docile than slaves at work<sup>64</sup>. And at the North African prisons of Orán or La Goleta, that originally had only a military use<sup>65</sup>, were also sentenced some civil offenders since the middle of sixteenth century<sup>66</sup>.

The punishment to North African prisons started to be used for an increasing number of civil crimes, and in the eighteenth century it was widely used to fortification works<sup>67</sup>. At this time, the Spanish fleet had decreased and new naval techniques made the galley penalty unnecessary, and in 1771 Carlos III decided to substitute it for the African prisons, or a new penalty to Arsenals for qualified offenders (in Cartagena, Ferrol or Cádiz).

---

<sup>58</sup> Maestro, T.M (1972), *Voltaire and Beccaria...*, pp.76-82.

<sup>59</sup> Maestro, T.M (1972), *Voltaire and Beccaria...*, pp.100-123.

<sup>60</sup> Vidal, G. (1921), *Cours de Droit criminel et de science pénitentiaire*, París, p.23.

<sup>61</sup> Carbasse (2000), *Histoire du droit pénal...*, pp.371 y ss.

<sup>62</sup> Alejandro, J. A. (1978), "La función penitenciaria de las galeras", in *Historia 16*, oct.-1978, extra number, pp.48-49.

<sup>63</sup> Rodríguez Ramos, L. (1982), "La pena de galeras en la España moderna", in *Estudios Penales*, Salamanca; or Zysberg, A., and Burlet, R. (1989), *Gloria y miseria de las galeras*, Madrid.

<sup>64</sup> Cabanillas, R. (1838), "Memoria sobre las minas de Almadén", in *Anales de minas*, Madrid, t.I, p.411; Matilla Tascón, A. (1958), *Historia de las minas de Almadén (desde la época romana hasta el año 1645)*, Madrid; Salillas, R. (1913), *La cárcel real de esclavos y forzados de las minas de azogue de Almadén y las características legales de la penalidad utilitarista*, Madrid; and Bleiberg, G. (1977) "El informe secreto de Mateo Alemán sobre el trabajo forzoso en las minas de Almadén", in *Estudios de Historia Social*, jul-dic. 1977.

<sup>65</sup> Roldán Barbero, H. (1988), *Historia de la prisión en Espanya*, Barcelona; Fraile, P. (1987), *Un espacio para castigar. La cárcel y la ciencia penitenciaria en España (siglos XVIII-XIX)*, Barcelona; Trinidad Fernández, P. (1991), *La defensa de la sociedad. Cárcel y delincuencia en España (siglos XVIII-XX)*, Madrid; and Burillo Albacete, F.J. (1999), *El nacimiento de la pena privativa de libertad. Siglos XVI-XX*, Madrid.

<sup>66</sup> Cerdán de Tallada, T. (1547), *Visita de la cárcel y de los presos*, Valencia, p.40.

<sup>67</sup> Trinidad Fernández, P. (1991), *La defensa de la sociedad...*, p.23.



The Arsenals had been used as a penalty at least since 1748, as a result of the ambitious military policy developed by the *Marqués de Ensenada*<sup>68</sup>. But their use was ephemeral, because the capacity of Arsenals was limited, and they were really affected by the crisis in naval industry and the introduction of steel bombs in the sector<sup>69</sup>. Therefore, this punishment stopped being used after the disaster of the Spanish navy in Trafalgar, its abrogation being determined in 1818<sup>70</sup>. The imprisonment consolidated this way at the beginning of the nineteenth century unlike other utilitarian punishments, and together with the African prisons, others started to be built in the Peninsula to punish an increasing number of offenders. The first peninsular prison was that of *El Prado*, where prisoners carried out the urban plan approved by Carlos III. Later the prison of *Puente de Toledo* or *Camino Imperial* was founded, for the convicts worked in a new way from Madrid to the French frontier, and other civil prisons were also built in Málaga, Cádiz and Cartagena, to take in the great number of prisoners waiting to be sent to the crowded African prisons.

The humanism was probably more deeply rooted in our country than in others thanks to the work of the School of Salamanca<sup>71</sup>. Covarrubias, Fray Domingo de Soto, Fray Antonio de Guevara and Juan Luis Vives, among others (also the mystics Santa Teresa de Jesús, San Juan de la Cruz, Fray Luis de Granada or Fray Luis de León), studied the causes of sin and pointed out the means to reach virtue by dominating passions. They, and especially Juan Luis Vives, saw for the first time poverty and idleness as the cause of all vices, and promoted new ways to fight against them. The ideas of Juan Luis Vives had followers as Miguel Giginta, Cristobal Pérez de Herrera, Magdalena de San Gerónimo, or Cerdán de la Tallada<sup>72</sup>, who wrote about the state of prisons and jails trying of encourage their improvement during the sixteenth and seventeenth century<sup>73</sup>. From those humanitarian proposals also emerged at that time private care houses like the so-called *Casas de Arrepentidas* for women, *Casas de Misericordia* (*Mercy Houses*), or *Hospicios* (*Hospices*), and, at the beginning of the seventeenth century was built the first prison for women, named the *Galera de Mujeres*.

The Enlightenment encouraged this humanitarian feel, and a new institutional paternalism began to predicate the public protection of the poverty. For men like Ward, Feijoo, Meléndez Valdés, Foronda, Jovellanos, Campomanes or Floridablanca, poverty and illness were the origin of any social depravation, damaged the progress of the State, and caused most of the crimes<sup>74</sup>.

---

<sup>68</sup> However, the galley penalty would be temporarily reinstated in 1784, in order to move ships against the Algerian piracy in the Mediterranean, and would not be definitely suppressed until 1803. Sevilla, F. (1917), *Historia penitenciaria española: La Galera*, Segovia.

<sup>69</sup> Burillo Albacete, F.J. (1999), *El nacimiento de la pena...*, p.32.

<sup>70</sup> Lasted only the Arsenal of San Fernando, in Cadiz, but it was affected to the exclusive jurisdiction of the Navy. Lasala Navarro, G. (1955), "Condena a obras y presidios de arsenales", in *Revista de Estudios Penitenciarios*, nº. 119, pp.28-29.

<sup>71</sup> Montes, J. (1903), *Los principios del Derecho penal según los escritores españoles del siglo XVI*, Madrid; Hinojosa y Naveros, E. (1948), *Influencia que tuvieron en el derecho público de su país y singularmente en el derecho penal, los filósofos y teólogos anteriores a nuestro siglo*, en *Obras*, tomo I, Madrid; or Rodríguez Molinero, M. (1959), *Origen español de la ciencia del Derecho penal. Alfonso de Castro y su sistema penal*, Madrid.

<sup>72</sup> Giginta, M. (1579), *Tractado del remedio de pobres*, Coimbra; Pérez de Herrera, C. (1598), *Discurso del Amparo de los legítimos pobres y reducción de los fingidos*, Madrid; San Jerónimo, M. de (1608), *Razón y forma de la Galera Real que el rey nuestro señor manda hacer en estos reinos para castigo de las mujeres...*, Valladolid, in *Apuntes para una Biblioteca de Escritoras españolas*, BAE, Madrid, 1903, t. II, p.304; and Cerdán de Tallada, T. (1574), *Visita de la cárcel y de los presos*, Valencia.

<sup>73</sup> Chaves, C. de, *Relación de las cosas de la cárcel de Sevilla y su trato*, undated, in Galardo, B. (Ed) (1968), *Ensayo de una biblioteca española de libros raros y curiosos*, t. I, Madrid, 1866, fac. in Madrid, 1968; and León, P. de, *Compendio de algunas experiencias en los ministerios de que usa la Compañía de Jesús*, undated, published by Herrera Puga, P. (1974), *Sociedad y delincuencia en el siglo de Oro*, Madrid.

<sup>74</sup> Jovellanos, G. M. de (1952), *Discurso que pronunció en la Sociedad Económica de Madrid en 24 de diciembre de 1784*, *Obras*, t. II, BAE, vol. L, Madrid, p.29, or *Discurso acerca de la situación y división interior de los hospicios con respecto á su salubridad*, *Obras*, tomo V, BAE, tomo LXXXVII, p.431; Campomanes, P.R. de (1774), *Discurso sobre el fomento de la industria popular*, Madrid, reprint Madrid, 1975; Ward, B. (1762), *Proyecto económico*, Madrid, reprint Madrid, 1982, or (1767), *Obra pía y eficaz modo para remediar la miseria de la gente pobre de España*, Madrid; Anzano, T. de (1778), *Elementos preliminares para poder formar un sistema de gobierno de Hospicio general*, Madrid; Murcia, P.J. de (1798), *Discurso político sobre la importancia y necesidad de los hospicios, casas de expósitos y hospitales*, Madrid; Feijoo, B.J. (1952), *La ociosidad desterrada y la milicia socorrida*, *Discursos. Obras Escogidas*, t.I, Madrid; Foronda, V. de (1789-1794),

It must be noticed, also, that a new ardour for productivity emerged in the eighteenth century in all Europe, where a lot of initiatives were carried out in order to make poor and beggars useful to the State. The preceding utilitarianism grew up in the new political economy, and Spain also joined the common desire for making productive, happy citizens of the abject poor. The Spanish projects based on a new model of public hospice (like the French “*dépôt*”), which essential function ought to be educational by the learning of a job, and repealed the traditional model based just in private charity. Consequently, there was a campaign against ancient “*obras pías*” (work of mercy), “*cofradías*” (religious confraternities) or small private hospitals, and new public hospices were founded for the education and correction of the poor<sup>75</sup>. Another problem was that of the so called ‘unable’, useless to serve the State by the aforementioned penalties (galleys, mines, arsenals, hard labour in prisons...), and unworthy of hospices’ assistance. A regulation of 1775 stated that the unable should be sent to specially destinations in the army or public suitable works, or to hospices, houses of mercy, or similar places<sup>76</sup>. But the asylum of the unable offender together with real beggars, in the same hospices or mercy houses, even in separate rooms, provoked angry protests. To quell these protest, in 1781 it was enacted a new law giving the unable a particular destination: the called “*Casas de recolección y enseñanza caritativa*”<sup>77</sup>. But these kind of houses never were founded, and in 1784 unable vague were sent again to hospices or mercy houses till 1788<sup>78</sup>. Then, they went mainly to prisons.

Even though, at the end of the eighteenth century, many hospices had been founded for the education and correction of the real poor, and some manufactures had been also reformed to that end<sup>79</sup>. Some of them were really innovative and successful, as the hospice for poor young *Los Toribios* of Sevilla<sup>80</sup>, the Hospital of San Juan Bautista, the Prison of *El Prado*, the Correctional of San Fernando, or the hospice of Fuencarral in Madrid<sup>81</sup>. Nevertheless, the maximum severity doctrine already had many supporters at the time, including Menéndez Valdés<sup>82</sup>, father Feijóo<sup>83</sup>, or even father Sarmiento<sup>84</sup>, for whom alternative to death was deportation for life to the colonies. Unlike them, Sempere, Lardizábal or Foronda<sup>85</sup>, went further in the new understanding of criminality, anticipating some of the liberalism ideas. They understood that strictness was related to the wick of the offender and the social prevention, but also to the insecurity of law and to the high failure index in the administration of justice. Therefore, the principles of legality and proportionality, and a correct procedural reform, were considered by these writers the most efficient solutions to cruelty before becoming fundamental elements in Beccaria’s work: ‘*regulations are not feared by the enormity of the punishments, but for the certainty of its application, and the more severe they are, the more inefficient and impracticable they are*’<sup>86</sup>.

---

*Cartas sobre los asuntos más exquisitos de la Economía-política, y sobre las leyes criminales*, 2 vols., Madrid; or Meléndez Valdés, J. (1997), *Discursos forenses*, Obras Completas III, Madrid.

<sup>75</sup> Coronas, S. (1996), *El libro de las leyes del siglo XVIII*, 5 vols., Madrid, t. IV, lib. XII, n.12, pp.2401-2422.

<sup>76</sup> Novísima Recopilación de las Leyes del Reino (NoR) 12, 31, 7

<sup>77</sup> Coronas, S. (1996), *El libro de las leyes...*, t. IV, lib. XII, n. 25, pp.2435-2437, and NoR 12, 31, 10.

<sup>78</sup> NoR. 12, 31, 12. The move drew a swift reaction from the hospices, that complained to the king of taking that kind of “vicious persons of either sex by way of correction or punishment,” mingled false with real poods, and Carlos III had to derogate it in 1788 (NoR. 12, 40, 19).

<sup>79</sup> Carasa Soto, P. (1995), “Los peligros de la pobreza. Los valores del liberalismo y las soluciones asistenciales burguesas”, in *Antiguo Régimen y liberalismo. Homenaje a Miguel Artola*, vol.2. Economía y Sociedad, Madrid, pp.433-435, y Trinidad Fernández, P. (1991), *La defensa de la sociedad...*, p.44.

<sup>80</sup> Baca, G. (1766), *Los Thoribios de Sevilla*, Madrid.

<sup>81</sup> Howard, J. (2003), *El estado de las prisiones en Inglaterra y Gales* (1789), transl. México, pp.337-343.

<sup>82</sup> Melendez Valdés, J. (1997), *Discursos forenses...*, p.148.

<sup>83</sup> Feijoo, B.J. (2004), *Teatro crítico universal*, elibro, Madrid, p.286. Silva Melero, V. (1956) “La faceta criminológica en el pensamiento del padre Feijóo”, in *Anuario de Derecho Penal y Ciencias penales*, and Pérez Ferrer, E. (1964), “Ideas penales y penitenciarias del padre Feijóo”, in *Revista de Estudios Penitenciarios*, nº 166.

<sup>84</sup> González Guitián, L. (1986-1987), “¿Un predecesor de Beccaria?”, in *Estudios Penales y Criminológicos*, Santiago de Compostela, XI.

<sup>85</sup> Lardizábal, M. de (1982), *Discurso sobre las penas contraído á las leyes criminales de España para facilitar su reforma* (Madrid, 1782), fac. México, pp.43-48, and Foronda, V. de (1789-1794), *Cartas sobre los asuntos...*, commented by Rivacoba, M. de (1996), “Un discípulo español de Beccaria, desconocido en España”, in *Revista de Derecho Penal y Criminología*, Madrid, num.6, pp.953-1068, y (2001), “Últimos escritos penales de Foronda”, in *Homenaje al Dr. Marino Barbero Santos in memoriam*, Cuenca, pp.569-577.

<sup>86</sup> Sempere y Guarinos, J. (1801), “Policía de España acerca de los pobres, vagos y malentretrenidos”, in *Biblioteca Española Económico-Política*, t. I, Madrid, p.55.

The question was deeply discussed in Spain due to the law that punished theft in the Courtship with the capital penalty<sup>87</sup>. The higher Court in the country asked the monarch for a restrictive interpretation of the law, arguing that it didn't get a preventive purpose because its severity<sup>88</sup>. So, Felipe V allowed arbitrariness<sup>89</sup>, and finally Carlos III ordered not to apply the law, arguing that '*punishments should be proportional to crimes*'. At this time, Spain started to receive new ideas about the criminal reform already spread through Europe. Carlos III supported them, even promoting prizes to the best essays about the topic<sup>90</sup>. The interest for crime and its causes was so evident during his government, that some scholars have situated in it the coming of a 'premature criminal sociology'<sup>91</sup>. But criminal reform in Spain at that time had nothing to do with the revolutionary ideology. It arose only from the desire for efficacy and administrative order, and also from the increase of a humanitarian and philanthropic feeling.

However, also during Carlos III reign, Spain received the first revolutionary European ideas. In 1770 it was published in Madrid the work by Alfonso María de Acevedo, *De reorum absolutione*<sup>92</sup>, though generally maintaining the principles of the traditional doctrine, was contrary to the application of torture following Beccaria's thought<sup>93</sup>. Beccaria's ideas also inspired Jovellanos' drama *El delincuente honrado* (1773)<sup>94</sup>; and even his famous treatise "*Dei delitti e delle pene*" was first translated into Spanish just ten years after being published, although it was hardly criticized<sup>95</sup>, and later forbidden<sup>96</sup>. Carlos III himself ordered to carry out an exhaustive study about the main criminal issues at the time in 1776: the abuse of death penalty, the application of torture, the state of prisons and jails, and the need of a modern Criminal Code<sup>97</sup>. The creation of a new Criminal Code was long defended by a good number of important politicians and jurists<sup>98</sup>. In fact, in 1770 the first frustrated attempt was made<sup>99</sup>, and now the idea was recovered in this report that Carlos III asked to do, which positioned Spain ahead of the criminal reform in Europe though just briefly.

The project was commissioned to Manuel de Lardizábal, who finally presented their results in 1789. The work was sent to be revised, but it never got official approval, probably because it was not the Code expected<sup>100</sup>, but also because of its revolutionary connotations<sup>101</sup>. In view of the French revolutionary events, Carlos IV hurried to remind in 1789 that Spain had the most merciful criminal laws in Europe, rejecting the work made by Lardizábal. Spanish criminalist who anticipated Beccaria's ideas, lived their hardest times during the reign of Carlos IV, some of them being persecuted and imprisoned; and the works of the most influential foreign writers (as Montesquieu, Rousseau, Voltaire or Beccaria), were forbidden and persecuted by the Inquisition. Beccaria's treatise in particular was forbidden in 1777, and the prohibition was on until the Inquisition abolition in 1813<sup>102</sup>. Nevertheless, some writers continued to support the criminal reform.

<sup>87</sup> NoR 12, 14, 3, and NoR 12, 14, 4.

<sup>88</sup> Sempere y Guarinos, J. (1785), *Ensayo de una biblioteca española de los mejores escritores del reinado de Carlos III*, Madrid, t. III, Lardizábal.

<sup>89</sup> NoR 12, 14, 6.

<sup>90</sup> Martínez Ruiz, E. (1988), *La seguridad pública en el Madrid de la Ilustración*, Madrid, p.181.

<sup>91</sup> Alloza Aparicio, A. (2001), *En busca de las causas del crimen. Teorías y estudios sobre delincuencia y justicia penal en la España moderna*, en Espacio, Tiempo y Forma, Serie IV, Historia Moderna, nº14, p.474.

<sup>92</sup> Acevedo, A.M. de (1770), *De reorum absolutione*, Madrid, transl. *Ensayo acerca de la tortura o cuestión del tormento*, Madrid, 1817.

<sup>93</sup> Against it, Castro, A. de (1778), *Defensa de la tortura y leyes patrias que la establecieron: e impugnación del Tratado que escribió contra ella el Doctor D. Alonso María de Acevedo*, Madrid.

<sup>94</sup> Jovellanos, G. M. de, *El delincuente honrado*, Obras Completas, t. I, pp.467-565.

<sup>95</sup> Cevallos, J. de (1775-1776), *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, 6 vols.

<sup>96</sup> Delval, J. A. (1995), *Beccaria en España*, in *De los delitos y de las penas*, Madrid, pp.161-176.

<sup>97</sup> In that act from 1776 "shone clearly the sense of reform". Antón Oneca, J. (1966), "El derecho penal de la Ilustración y Don Manuel de Lardizábal", in *Revista de estudios penitenciarios*, 174, p.601.

<sup>98</sup> Antón Oneca, J. (1966), *El derecho penal de la Ilustración y don Manuel de Lardizábal*, in *Revista de Estudios Penitenciarios*, nº174, p.602.

<sup>99</sup> Salillas, R. (1819), *Evolución penitenciaria de España*, 2 vols, Madrid, fac. Pamplona, 1999, vol.1, p.93.

<sup>100</sup> Antón Oneca, J. (1966), *El derecho penal de la Ilustración...*, p.603.

<sup>101</sup> Tomás y Valiente, F. (1969), *El derecho penal de la monarquía absoluta...*, pp.104-105.

<sup>102</sup> Torio, A. (1971), "Beccaria y la Inquisición española", in *Anuario de Derecho Penal*, p.391.

After the frustration of his legislative project, Lardizábal published his conclusions in 1782, in a paradigmatic work entitled “*Discurso sobre las penas conchado a las leyes criminales de España para facilitar su reforma*”, very influential in the years to come. Before the Independence War, “*La ciencia de la Legislación*” by Gaetano Filangiery, was also translated by Rubio, and the letters by Valentín de Foronda were published, urging towards the criminal reform on the basis of the guarantees existing in the English law. We should finally highlight the work by José Marcos Gutiérrez, *Práctica Criminal de España* (1804), which also introduced in Spain the postulates of the Classical School of Criminology, promoting the new Rule of law.

##### **5. CONCLUSION**

As we have seen, there are increasing evidences that the chronology of the decline of corporal punishment and the growing of “secondary” punishments, is very different from that suggested by traditional literature. Changes were arisen in the criminal proceedings and criminal laws all over Europe long before French revolution. It’s necessary a proper study of legal history to gain a complete grasp of criminal principles and institutions. The early expositions of legal principle cannot be appraises unless it is recognised that they represent but one stage in the continuous development of the legal institution to which they refer.