



Yves Cartuyvels, *D'où vient le code pénal?: une approche généalogique des premiers codes pénaux absolutistes au XVIII^e siècle* / Michel Porret, (Ed.), *Beccaria et la culture juridique des Lumières*

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J.A. Sharpe



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Comptes rendus Review

Yves Cartuyvels, *D'où vient le code pénal?: une approche généalogique des premiers codes pénaux absolutistes au XVIII^e siècle*, Paris/Bruxelles, Les Presses de l'Université de Montréal/ Les Presses de l'Université d'Ottawa/ De Boeck Université, 1996 (Préface de Françoise Tulkens), XX + 404 pp., ISBN 2 8041 2360 X.

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It is encouraging to see how work currently in progress is opening up our understanding of the significance and operation of the law in Ancien Régime Europe, a trend which is illustrated by the two books, each of them well researched and well thought out works which add much to grasp of such matters, under review here. Both of them, of course, deal with fairly familiar topics: everyone who has studied the history of European law will have heard of Beccaria, while the law codes created by enlightened despots in the eighteenth century have long been known about. But both of these volumes open up new approaches to, and give us new insights upon, their respective subjects.

Cartuyvels is, in effect, attempting a bold work of synthesis, and one which takes in moves towards the codification of the law from the famous Carolina of Charles V onwards. The first half of the book is concerned with these earlier developments, taking a comparative approach which encompasses France, Italy, and some of the territories that lay within the Holy Roman Empire. In all states, he argues, the push towards codification of the law was connected with the broader needs of state formation, and in particular the logic of centralisation. To legal developments linked overtly to the needs of the state were added, especially in the seventeenth century, the development of natural law doctrines which in some measure anticipated ways of thinking which are more commonly associated with the Enlightenment: Cartuyvels discusses the thought of Althusius, Grotius, Pufendorf, Wolff, and Leibnitz, and devotes a section to Jean Domat, whom he sees as the precursor of modern codification of the law in France. This part of the book ends with an analysis of the Prussian and Bavarian codes of the mid eighteenth century, which are interpreted as being on the cusp of two different rationales of law codes, these rationales being themselves related to specific stages in the history of political theory and of state-formation.

Part two of Cartuyvels book concentrates on the codes created by, or at least under, the Enlightened Despots of the later eighteenth century. Separate chapters are

devoted to each of the most noteworthy of these: that promulgated by Catherine the Great of Russia in 1767; the Tuscan code of 1786, the Leopoldina; the code of Joseph II of Austria, promulgated in 1787; and the project for a penal code in Lombardy. Once again, a valuable comparative framework is maintained, although each separate topic is treated on its own terms and covered in appropriate detail. The book is rounded off by a conclusion, in which the author draws the threads together, and in particular demonstrates his ability to link the theme of law reform with the broader intellectual and political developments of the period he studies.

The work edited by Michel Porret is a timely collection of essays on Beccaria, the fruits of a colloquium held at Geneva in November 1994. The various essays, taken together, cover many aspects of what might be described as Beccaria studies. A number of them, appropriately enough, are concerned with the reception of Beccaria's thought in various national contexts: Spain, England, and Scandinavia. Others are precisely – focussed pieces covering more specific topics: a discussion of an unedited translation of *On Crime and Punishment*, for example. More numerous are those which discuss Beccaria's thought in the context of the more general legal developments of the period: thus there are contributions on legal medicine after Beccaria, on legal medicine and torture in eighteenth-century Italy, on the philosophical foundations of Beccaria's ideas on the function of punishment, and on Beccaria and the formation of modern notions of public order. One has the sense that the conference from which this volume derives must have been an intellectually exciting event: the range of papers delivered, and the informed yet lively scholarship which informs them, is most impressive.

A number of the essays in this collection also lead us forwards to a consideration of that set of problems which, I would contend, forms the basis of a serious questioning of the type of approach to legal history from which, it seems to me, Cartuyvels' book, despite its undoubted virtues, does not escape. One has, as has already been suggested, for long been familiar with the legal reforms of the enlightened despots. These have been much written about, although this statement is not in any way intended to question the individuality and freshness of Cartuyvels' analysis, and his ability to deal with the relevant issues on a comparative basis. What one wonders, of course, is how effectively the philosophy enshrined in these new, rational, modernising codes informed the practices of local officials and local judges. The idea that local law enforcement agents in, say, the Urals or the more remote parts of Leopold II's Hungarian possessions became philosophes overnight, and eagerly thumbed through translations of Beccaria as they honed up their appreciation of more rational penal strategies seems a little unlikely. I personally would welcome detailed studies on the actual workings of the criminal courts and local legal systems in states where new, enlightened, legal codes were promulgated to see what difference, on a grass roots level, these grandiose schemes actually made.

These problems are, for example, highlighted in Porret's collection by Xavier Rousseaux's essay on the Habsburg possessions, which examines penal practices as well as doctrines and projects, and in Nicole Dyonet's study of the *maréchaussée* and judicial culture in Beccaria's day. Both demonstrate, at certain points, how Ancien Régime penal practices, if less streamlined and rational than either the philosophes of the time or modern historians would have liked, did have a logic of their

own, and seemed to be generally accepted. This raises a further point. Much of the writing on Enlightenment law reform seems to be constrained within what an Anglophone historian would describe as a Whig Interpretation: that is, an occasionally triumphalist history which takes an uncritical celebration of progress as its main theme. People in the past were not quite as enthusiastic for progress, or at least change, as are modern historians, and there must be a large question as to how far judges and the perhaps relatively unenlightened local law enforcement officers to whom I have referred reacted to the changes proposed by their rulers and the intellectuals whom, in the eighteenth century, it was fashionable to trust as policy makers. Again, we need to know more about the personnel manning Europe's criminal justice systems, the attitudes of such people, and how those machines actually operated.

But between them these do books have done us a valuable service. *D'où vient le code pénal?* Has provided us with a thoughtful, scholarly, yet lively and wide ranging restatement of what is, in essence, the traditional framework for the legal history of Ancien Régime Europe. The collection edited by Porret, while celebrating what has long been accepted as a key figure in that traditional history, does contain many pointers to how future research might move beyond that framework, and deepen our understanding of this important and fascinating aspect of Europe's past.

J.A. Sharpe
(University of York, England)
jas19@york.ac.uk

Clive Emsley, *Crime and Society in England 1750-1900*, London and New York, Longman, 1996 (2nd ed.), 287 p., ISBN 0 522 25768-9.

The first edition of this work, bringing together for the first time the findings of specialized scholarship in a concise overview of the subject, immediately became a standard reference. In less than a decade, the large amount of scholarly work in the decade since has called forth a revised edition, one which maintains the work's position as an indispensable introduction to the field. Like its predecessor, this edition provides not only authoritative brief summaries of specialized research (including the author's own), but a most attractive text for undergraduate and graduate students. Emsley has managed to marry precision of exposition with the vividness of a multitude of examples drawn from the archives. The original edition is updated throughout, as findings and arguments of work done in the intervening decade are smoothly incorporated – including some work not yet published. As the focus within the field has moved from crime as a social activity to how crime was defined and dealt with, Emsley's chapters on these subjects have become richer, without giving up the clarity of the first edition.

The most important difference between editions is the addition here of an entirely new chapter on gender, a perspective that was barely acknowledged a decade ago. This chapter opens with Frances Heidensohn's apt observation that, even more than class, gender is «the crucial variable in predicting criminality.» Yet the over-