

**SEPARATION OF POWERS AND PARLIAMENTARISM
THE PAST AND THE PRESENT
LAW, DOCTRINE, PRACTICE**

**56th Conference of International Commission for the History of Representative
and Parliamentary Institutions in Cracow and Radom (5-8 September 2005)**

**PODZIAŁ WŁADZY I PARLAMENTARYZM
W PRZESZŁOŚCI I WSPÓŁCZEŚNIE
PRAWO, DOKTRYNA, PRAKTYKA**

**56. Konferencja Międzynarodowej Komisji Historii Instytucji Reprezentatywnych
i Parlamentarnych w Krakowie i Radomiu (5-8 września 2005)**



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Five Hundred Years Anniversary of the *Nihil novi* Statute of 1505
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STUDIES PRESENTED TO THE INTERNATIONAL COMMISSION FOR THE HISTORY
OF REPRESENTATIVE AND PARLIAMENTARY INSTITUTIONS
VOLUME 84

Edited by
Wacław Uruszcak, Kazimierz Baran, Anna Karabowicz



Sejm Publishing Office
Warsaw 2007

Opracowanie graficzne
Zdzisław Byczek

Redaktor
Kazimierz Stembrowicz

Redaktor techniczny
Anna Rowicka

Korektor
Anna Stembrowicz

On the cover:

The xylograph of the General Sejm of Kingdom of Poland held in Radom in 1505;
as published in: Jan Łaski, *Commune inclyti Poloniae Regni Privilegium*,
Kraków, by Jan Haller, 1506.

Publikacja wydana dzięki wsparciu finansowemu
Krajowego Depozytu Papierów Wartościowych SA w Warszawie

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Warszawa 2007

ISBN 978-83-7059-824-2

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ALICANTE, SPAIN

LEGAL POWERS OF THE SPANISH SENATE DURING THE MODERATE DECADE (1844-1854)

1. Introduction. 2. The Spanish Senate During the Moderate Decade. 3. Jurisdictional Powers of the Senate: 3.1 Makeup, Nature, and Limits Until 1845. 3.2. The Senate Jurisdiction Act of 11th May 1849. 4. *The Calderón Collantes Case* as Guideline Defining Senate Jurisdiction and the 1848 Penal Code: 4.1. *The Calderón Collantes Case*. 4.2. The Procedural Interpretation of the 1848 Penal Code.

1. Introduction

The 1845 Spanish Constitution conferred the Senate an extraordinary political significance which became particularly manifest when it was vested jurisdictional powers of a scope never to be found again in any subsequent Spanish constitutional text. The objective pursued in the present paper is twofold: on one hand i) To highlight how the development of the Senate's legal competences enshrined in the 1845 Constitution fostered the formulation of a novel law-as there was no other like it at the time in developed countries with a constitutional parliamentary tradition such as France and England; and on the other hand ii) To delve into the application of that law considering the fact that it was judicially construed to analyze a court case-which was the sole instance that law was applied. The proceedings were brought against Minister Esteban Calderón Collantes and constituted a remarkable historical testimony concerning the application of one of the most important laws enacted during the Moderate Decade: the 1848 Penal Code, regarded unanimously by Spanish experts in criminal law not solely as a model for subsequent Spanish penal codes up to the current 1995 one, but also for Latin American codes.

Resources used in this study include the following documentation: i) texts written on the subject matter and currently filed at the Archivo de las Cortes Españolas (Spanish Parliamentary Archives); ii) Interpretations involving legal powers and the drafting of a law regulating such powers by the Spanish jurists of the time; iii) Minutes of the Senate public hearing convened in the form of a Court of Law; iv) Documents pertaining to the 1848 Spanish Penal Code; and, v) The most relevant works written on the Code by analysts.

2. The Spanish Senate during the Moderate decade

The *Década Moderada* (Moderate decade) comprises the period between 1844 and 1854, when the Government was in the hands of the Moderate Party¹. During that time the State's main concerns rested on four essential pillars: i) Order (basic and unquestionable principal of moderantism), associated to the consolidation of institutions and fundamental in material development²; ii) Safety and protection of private property; iii) An overall centralizing policy; and finally, iv) Doctrinairism as an ideological basis for a new era³.

The new moderate political system finally took shape with the enactment of the 1845 Constitution, which was a synthesis of doctrinairism and *jovellanism*, together with reminiscences of Benthamism, which served the particular economic and political interests of the government of those who owned property and an enlightened minority who aspired to rule the country⁴. The 1845 Constitution vis-à-vis that of 1837⁵, in force until then, meant a leap forward in purely monarchical terms of view and a backward step in strictly constitutional terms, and was highly useful to the State in ensuring the order demanded by all⁶.

The Senate appeared as a key player within the new constitutional framework⁷. According to the 1845 Constitution the Senate was configured as a conservative body designed to reinforce the power of the Crown; that is to say, the Senate would limit the abuse of power and restrain the excesses of democracy⁸. The 1845 Constitution devised Senate posts held for life (sect. 17)

¹ To find out more on the moderate party see López Puerta, *Moderados y progresistas (1833–1868)*, Madrid 1971; José Luis Comellas, *Los Moderados en el poder (1844–1854)*, Madrid 1979, p. 243; Canovas Sánchez, *El Partido Moderado*, Madrid 1982.

² The bitter experience of the Liberal Triennium (1820–1823) gave impetus to moderantism among liberals. At the time of Queen María Cristina, doctrinaires talked about a harmonic and constructive synthesis between freedom and order. Fernández de Córdova, *Mis Memorias Intimas*, vol. II, Madrid 1966, pp. 125, 126; Raymond Carr, *España (1808–1975)*, Barcelona 1992, p. 232.

³ Eloy Terrón, *Sociedad e ideología en los orígenes de la España contemporánea*, Barcelona 1969, p. 157; Díez del Corral, *El Liberalismo doctrinario*, Madrid 1945; Garrorena Morales, *El Ateneo de Madrid y la teoría de la Monarquía liberal (1836–1847)*, Madrid 1974.

⁴ José Luis Aranguren, *Moral y sociedad. La moral social española en el siglo XIX*, Madrid 1974, pp. 63, 96, 97.

⁵ Constitutional texts in Diego Sevilla Andrés, *Constituciones y otras Leyes y Proyectos políticos de España*, Madrid 1969, vol. I.

⁶ The constitutional reform was not the outcome of a widely held sentiment in the nation, but stemmed from an exclusively moderate interest. Valera, *Historia General de España de Lafuente*, vol. 23, Barcelona 1890, p. 1; Tomás Font de Mora, *La preparación de la Constitución de 1845*, *Revista de Estudios Políticos (REPo)*, 73, 1991, pp. 229–241; *idem*, *Las Cortes revisoras de 1884/1845. Su fisonomía*, *ibidem*, 22, 1991, pp. 55–57; Medina Muñoz, *La reforma constitucional de 1845*, *REPo*, 203, 1975, pp. 75–105; Canovas Sánchez, *El moderantismo y la Constitución española de 1845*, Madrid 1982.

⁷ Sánchez Agesta, *Historia del Constitucionalismo español*, Madrid 1964, p. 250; Sevilla Andrés, *El Senado de 1845*, in *Homenaje a Don Nicolás Pérez Serrano*, Madrid 1959, vol. II, pp. 3–28 (p. 18).

⁸ Enrile Aleix, *El Senado en la Década Moderada (1845–1854)*. *Typed Doctoral Thesis*, Madrid 1980; Bertelsen Repetto, *El Senado en España*, Madrid 1974.

with unlimited seats (sect. 14), appointed by the Queen in keeping with the requirements and categories under sect. 15, though such limitations were extremely flexible considering the fact that such categories could be altered merely by introducing new provisions⁹. Incidentally, to the middle class the Senate was a constitutional body at its service¹⁰. Regarding the legislative process, the Senate configuration enshrined in the 1845 Constitution ensured approval by appointing partisan senators¹¹.

That is how the moderates started a political regime based on the total Crown control-through the Council of Ministers-over the regulatory mechanisms of political actions. The fundamental options of the new political system were provided for by the corresponding rules. In this way the Law of 8 January 1845 introduced an overhaul of City and Regional Councils. The so-called "Province Governing Act" (*Ley para el Gobierno de las Provincias*) was enacted, thereby bestowing all kinds of powers upon political leaders. The exercise of freedom of speech was regulated with open-mindedness by the Decree of 10 April 1844, though it was eventually repealed by a Jury through Royal Decree of 6 July 1845. Additionally, the publication of newspapers was controlled by Decree of 18 March 1846, which for the first time envisaged the provisional and permanent suspension. Likewise, partisan appointments to Parliament was restricted by the Electoral Act of 18 March 1846, the outcome of the selective mentality of doctrinarism¹².

The moderate political system was completed with the enactment of the 1848 Penal Code, in time for the third anniversary of the Narváez Administration (4 October 1847–14 January 1851). This penal text ensured the protection of the legal doctrine devised by the moderate State structure. Finally, the Law of 11 May 1849 regulated the jurisdictional powers of the Senate.

⁹ Sect. 15: "Senators shall be appointed from Spanish nationals who in addition to being at least thirty years of age hold the following posts: Chairman of some co-legislative body, Senators or Representatives of the Assembly who have been re-elected three times, Crown Secretaries, Advisers to the State, Archbishops, Bishops, *Grandes de España* (Grandeos or Peers), General Captains of the Spanish Army or Navy, Ambassadors, Plenipotentiary Ministers, Supreme Court Justices, Ministers and their Attorneys. Those comprised in the foregoing categories shall be receiving 30,000 *reales* as income or in the form of personal assets, or salaries of employees which cannot be denied unless lawfully proven or due to retirement, resignation or termination. Titles of Catille receiving an income of 60,000 *reales*. Those who pay 8,000 *reales* one year in advance direct contributions or those who have been Senators or Representatives of the National Assembly or provincial assemblies, or mayors of towns over 30,000 souls, or Chairmen of Commercial Tribunals. The required conditions to be appointed as Senator may be modified by law", Ramón de Campoamor, *Historia crítica de las Cortes reformadoras, Obras Completas*, Madrid 1901, vol. II, pp. 115–156; Balmes, *La organización del Senado, Obras Completas*, vol. VI, Madrid 1950, p. 980.

¹⁰ Sevilla Andrés, *El Senado de 1845*, p. 15.

¹¹ Miguel Artola, *La burguesía revolucionaria (1808–1874)*, Madrid 1977, p. 134; Fernández de Cordova, *Mis memorias íntimas*, Madrid 1859, vol. II, p. 134.

¹² Martínez Cuadrado, *Elecciones y Partidos políticos de España*, Madrid 1969, vol. I, p. 63; Artola, *Partidos y Programas políticos 1808–1936*, vol. I, pp. 49, 50; Fernández Almagro, *Las Cortes del siglo XIX y la práctica electoral*, in REPo, 5, 1943, pp. 383–416; Monsell Cisneros, Pérez Díaz, *La practica electoral en el reinado de Isabel II*, RCG, 16, 1989, p. 43–177.

3. Jurisdictional powers of the Spanish Senate

3.1. Configuration, Nature and Limits of Senate Jurisdictional Powers in Spain until 1845

The granting of legal authorities to the Senate is inseparable from the evolution leading to the establishment of a bicameral system in Spain and the structural experimentation by Upper House through various constitutional texts¹³.

A first approach to the structuring of the Senate as a court of law can be found in the *Statute of Bayonne*¹⁴. This text deals with the Senate in Title VII, however, considering the set of powers conferred it cannot be regarded as a typical legislative assembly¹⁵. Notwithstanding, Title XI therein, while regulating the Legal System, sets up a High Royal Division—though not constituting a clear precedent defining Senate jurisdiction—as well as its structure, chiefly made up of senators (sect. 110), and its jurisdiction—mainly offenses by members of the Royal Family, ministers, senators and Government advisors (sect. 118). Thus the Senate was conferred the asset of having “a certain aspects pertaining to its further development”¹⁶.

The unicameral nature of the Legislative Assembly as prescribed by the Constitution of 1812 did not prevent the recognition of a Court governed by the Executive (Tribunal de Cortes) with powers to try criminal cases against Representatives (sect. 128). Said Constitution also granted the Legislative Assembly the capability to give effect to answerability motions against so-called Executive Branch Representatives (*Secretarios de Despacho*) and other public officials (sect. 131, 25th). Its oversight rested on the Supreme Court (sect. 261, 2nd). Regulation of 4th September 1813 was intended to oversee actions taken at the alluded Court of the Executive, which was subjected to the same law and order and formalities applicable to all citizens. Said Court’s members were elected by drawing lots among Representatives (sect. 52–53 and 56). Finally,

¹³ An analysis of these powers as defined in all Constitutions in Enrile Aleix, *El Senado en la Década Moderada*; Bertelsen Repetto, *El Senado en España*. Sevilla Merino, *El impeachment en el Derecho español del siglo XIX*, in *El Control parlamentario del Gobierno en las democracias pluralistas*, Ramírez (ed), Barcelona 1978, pp. 149–159. To find out more on particular administrations, commencement of sessions, the Presidency and Senators, see Valle de Juan, Pérez Samperio, *Próceres y Senadores. 1843–1923*, Madrid 1993; Rico y Amat, *Libro de los Diputados y Senadores*, Madrid 1862–1866. The texts of the different Constitutions and Reform Bills cited throughout this paper can be found in Sevilla Andrés, *Constituciones y otras Leyes y Proyectos políticos de España*, Madrid 1969.

¹⁴ Sanz Cid, *La Constitución de Bayona*, Madrid 1922, pp. 156, 418–440. To find out more on its doctrinal value see Sánchez Agesta, *Historia del Constitucionalismo español*, pp. 51 ff.

¹⁵ Enrile Aleix, *El Senado en la Década Moderada*, p. 1; Bertelsen Repetto, *El Senado en España*, p. 20.

¹⁶ Coronas González, *El Senado como Tribunal de Justicia*, in *Actas del IV Symposium de Historia de la Administración*, Madrid 1983, pp. 159–196 (p. 160).

rulings were executed as provided by law, never admitting consultative submissions to the Legislative Assembly (sect. 57)¹⁷.

The bicameral system was introduced in Spain by the enactment of the Royal Statute of 1834. The 2nd Section of this charter set up the two chambers of the Legislative Assembly: grandees of the nation and its representatives (*Próceres y Procuradores del Reino*)¹⁸. Though the Royal Statute did not mention anything regarding judicial powers of these two hierarchies, there are provisions under the Rules of 15 July 1834, which governed such powers¹⁹. The judicial powers of each chamber were thereby laid down²⁰; the grandees of the nation or *Próceres* were vested a broad legal authority that was never to be found again in any subsequent Spanish constitutional text.

In line with the foregoing, the *Próceres* chamber was conferred the power to judge Executive Representatives through accusations brought by the *Procuradores*, in accordance with an answerability law and according to stipulated formalities. In addition, the grandees could hear cases involving serious offenses against the immunity of the Throne and State security; and could try its own members on grounds of abuses or offences committed as *Próceres*; lastly, the chamber at hand had corrective authority over those who jeopardized its integrity as a whole or individually, or disturbed the sessions or disobeyed the chamber (sect. 119, Rules governing the *Próceres* Statute). Barring the judicial powers *stricto sensu*, the same authority was bestowed upon the chamber of *Procuradores* (sect. 139, Rules governing the *Procuradores* chamber).

Nevertheless, despite their scope such powers were never actually exercised while the Statute was effective, owing to political difficulties and, particularly, because the special law that had to regulate proceedings to demand Minister answerability was never promulgated—though it was requested by both chambers in several occasions²¹. The Mendizábal Administration, on 18 December 1835 submitted a bill concerning the answerability of Executive Representatives, whereby the legal powers of the Legislative Assembly were set out and confirmed²². In spite of the absence of this law during the Statute period, Minister answerability was

¹⁷ *Reglamentos del Congreso de los Diputados y de las Cortes*, Madrid 1977, pp. 68–70.

¹⁸ Tomás Villarroya, *El sistema político del Estatuto Real (1834–1836)*, pp. 259, 261, 575–578; San Miguel, *Constitución y Estatuto*, Madrid 1837; Fermin Caballero, *El Gobierno y las Cortes del Estatuto. Materiales para su historia*, Madrid 1873.

¹⁹ *Real Decreto que contiene los Reglamentos para el régimen y gobierno de los Estamentos de Próceres y Procuradores del Reino*, Madrid, Imprenta Real, 1834.

²⁰ In this fashion jurisdictional principles of the *Tribunal de Cortes* of the Cadiz Constitution of 1812. (Coronas González, *El Senado como Tribunal de Justicia*, p. 162).

²¹ DSProcuradores, 7 August 1834. Appendix and 28 August 1834, p. 96; DSPróceres, 18 September 1834, p. 81.

²² The *Procuradores* were compelled to denounce their chamber when government actions may call for answerability from Executive Representatives or *Secretarios de Despacho* (sect. 3). The exclusive competence of the *Próceres* was to try and rule cases with the name “Supreme Court of Justice of Illustrious Grandees” or *Tribunal Supremo de Justicia de Ilustres Próceres* (sect. 4). Tomás Villarroya, *El sistema político del Estatuto Real*, pp. 372, 373.

demanded in two occasions. It should be pointed out that by that time there was an awareness of the notion that the Legislative Assembly could only demand criminal accountability not political²³. This issue became significant years later during the proceedings against Minister Calderón Collantes, which is studied further ahead.

Other attempts to regulate Senate legal powers can be found in the “Reform Drafts of the Royal Statute” (*Proyectos de Reforma del Estatuto Real*). They are interesting in that they initiated a trend that was to be dealt with in subsequent Constitutions: limitation of legal powers on *Próceres* and restriction of the broad powers introduced during the Statute period. The most novel changes were introduced by the “Reform Bill” (*Proyecto de Ley Fundamental* or *Reforma del Estatuto*) drawn up by the “Isabelline Society” (24 July 1834)²⁴. The bill solely vested legal powers upon the *Próceres* to: hear lese-majesty cases (sect. 24); authorize prosecution of its members in civil cases and try them on criminal matters (sect. 25); and also to deal with accusations brought by the *Procuradores* against Ministers. For the first time reference was made to the nature of legal powers when these were described as discretionary²⁵. The participation of the *Procuradores* chamber was limited to the right to accuse Ministers before the *Próceres* chamber (sect. 35).

Likewise, the Isturiz Project²⁶ granted exclusive legal powers to the *Procuradores*, virtually maintaining the same powers as the Royal Statute (sect. 20), excluding the corrective authority which is abolished forever from Spanish constitutionalism. House Representatives who were accused were to be tried by the Court appointed a specific law (sect. 23)

The *Constitution of 1837*, initially raised as an reform of the Constitution of 1812, confirmed the system of two-chamber government introduced by the Royal Statute²⁷: *Senado*²⁸ (Senate) and Council of Ministers (lower house in

²³ *Ibidem*, pp. 373, 374.

²⁴ The Isabelline society was a secret society composed of a group of fervent liberals who have just returned from exile, *idem*, *La Constitución de 1812 en la época del Estatuto Real*, REPO, 126, 1962, pp. 255, 256; Antonio Pirala, *Historia de la Guerra Civil y de los partidos liberal y carlista*, I, Madrid 1856, p. 285 ss.

²⁵ Coronas González, *El Senado como Tribunal de Justicia*, p. 164.

²⁶ *Proyecto de Constitución formado por el Ministerio Istúriz para presentarlo a las Cortes revisoras, precedido de un Discurso preliminar sobre la Monarquía representativa* [Constitutional Bill formulated by the Istúriz Ministry for submission to the Legislative Assembly, preceded by a Preliminary Speech on Representative Monarchy]; Alcalá Galiano claims authorship (*Apuntes para la biografía del Excelentísimo Señor Don Antonio Alcalá Galiano*, Madrid 1955, vol. I, p. 297); Marqués de Miraflores, *Memorias para escribir la historia contemporánea de los siete primeros años del reinado de Isabel II*, Madrid 1843, vol. I, p. 633–645.

²⁷ Tomás Villarroya showed how the idea of two Chambers was generalized in Spain from the Royal Statute and confirmed by the Constitution from Belgium and the French Letter of 1830. (*La Constitución de 1812 en la época del Estatuto Real* [Constitution of 1812 in the times of the Royal Statute], p. 265).

²⁸ The term Senate was not very well accepted by the constituents of 1837, but later it was admitted by constitutional texts during all 19th Century. Even, the Pre-Project of the Constitution of the Second Spanish Republic in 1931, Enrile Aleix, *El Senado en la Década Moderada* [The Senate in the Moderate Decade], p. 69.

the Spanish Parliament, hereinafter Council). Among the common duties it was included the one to make effective Minister's liability. Accusation was a Council duty and Judgement, Senate's (art. 40. 4). Therefore, the judicial duties of the Senate were limited compared to the ones recognised in the Royal Statute and its *Reform Drafts*²⁹.

The jurisdiction granted to the Senate was justified in the Reform Project because it was the method adopted in all representative Governments, as it offered guaranteed for justice and success, because judges competence, independence and high position³⁰. Despite this justification, during the Project discussion, some objections to the power granted to the Senate were stated as it was considered as a failure to comply with the equal duties of the Chambers³¹. In defence of this it was said that there would not be equality between Senate and *Council* if Members had to "judge and accuse at the same time"³².

The restrictive tendency in the judicial jurisdiction of the Senate granted by the progressive Constitution of 1837, would change its sign in the reform carried out by the *Moderate Party*. In the *Constitution of 1845*, result of such reform, the Senate would increase significantly its granted duties, in line with the politic relevance granted by the constitutional text to such Chamber³³, continuing the tendency of other conservative national constitutions (Royal Statute and *Istúriz Project*) and foreign constitutions (French Letter of 1814 and 1830; Brazilian Constitution of 1824 and Portuguese Constitutions of 1836).

Concerning Senate's jurisdiction, the Project for constitutional reform presented to the *Council* on the 9th October 1844 by Narváez, added to the duty of judging Members (stated in the Constitution of 1837) the capacity for knowing about serious crimes against the person or dignity of the king, or against the State security, according to law; and finally, to judge people (art. 6, Título III)³⁴. As justification for this it was said that it was "more of a burden in favour to society... than a privilege"³⁵.

The Expert Report about the Constitutional Reform Project created by the Committee pointed by the *Council* (5–11–1844)³⁶ justified, qualified and

²⁹ Coronas González, *El Senado como Tribunal de Justicia* [Senate as Court of Justice], p. 165.

³⁰ *Project fro Constitution presented to Las Cortes by the spacial committee pointed out for that particular purpose*, DSCC, 1836–1837, 24 February 1837, No. 24, Apendix 1º, pp. 1753–1756.

³¹ *Expert Report from the Constitution Committee, proposing the basis for the reform that the constitution of 1812 should have. Read in the 30th Novembre 1836 session*, DSCC, 1836–1837, No. 43. Apendix 1º.

³² DSCC, 1836–1837, pp. 2166, 2203, 2187.

³³ See what it was said about the configuration of Senate in the moderate decade, part 1.

³⁴ DSCC, 1844–1845, p. 57.

³⁵ *Presentation of Causes and Project for the Reform of the Constitution of 1837*, DSCC, 1844–1845, pp. 53–58.

³⁶ *Ibidem*, pp. 285–292.

strengthened the judicial functions granted to the Senate. First, the Report gave the Project a double fundamental: on the one hand, in the nature of the crimes (serious attempts against the person or life of the king, or against the Estate Security); and on the other hand, in the quality of people (judgement to Members or Senators). The Committee understood that “so serious crimes and people of such a high dignity could not be judge by a less qualified Court without having serious inconveniences for public life”. Second, according to what had been established in 1837, Members would be judged only if the accusation came from the *Council*³⁷. And finally, judicial jurisdiction granted to the Senate was strengthened as the article 42 of the Constitution was partly changed: *permission needed* for the detention of members of the Senate was substituted by *order*, as it was considered that the Senate was the natural judge of its members and it could not, therefore, give permission to carry out the detention but order the arrest or prosecution³⁸.

During the discussion at the Chambers the capacity for Members judgement was unanimously accepted (art. 6, 1^o). The serious crimes against the King or the State security found some more objections (art. 6, 2^o). At the *Council*, Joaquín Francisco Pacheco and Manuel Seijas Lozano demanded a clarification of what was considered as serious crimes³⁹. In the Senate, the Duke of Gor presented an amendment to all of it, proposing the exclusion of the politic crimes as they would cause “a lot of work and trouble”⁴⁰. In defence, the *Ministro de la Gobernación* (Home Secretary), Pidal, pointed out that the trial against the conspirators carried out by the High Chamber would be an example for the public (essential issue for the moderates, as it has already been said above). He supported his arguments with foreign laws⁴¹. The *Duke of Frias* showed — “in times of revolution” — fear of the Senate turning into an ordinary court, with the consequent damage to legislative issues and the discredit for the Chamber⁴².

³⁷ *Ibidem*, p. 291.

³⁸ *Ibidem*, p. 289.

³⁹ It is necessary to highlight the importance of Pacheco and Seija's opinion on politic crimes. The influence of Pacheco has been unanimously recognised in the field of Spanish Penal Law and particularly in the Spanish Penal Code of 1848. He was one of the most important commentators, J. Francisco Pacheco, *Estudios de Derecho Penal. Lecciones pronunciadas en el Ateneo de Madrid en 1839 y 1840* (3rd Ed.), Madrid 1868; also, *El Código penal concordado y comentado* (1st Ed.), Madrid 1848–1849. Seijas Lozano was together with José María Clarós the redactor of this Code. About his personality, see Rico y Amat, *El libro de los Diputados y Senadores*. vol. III, p. 288; Lasso Gaité, *El Ministerio de Justicia. Su imagen histórica (1714–1981)*, Madrid 1984, pp. 107–109.

⁴⁰ DSCS, 1844–1945, p. 140.

⁴¹ For José Pidal “noone better to judge and finish — with the strength of debate and publicity — the conspirators than the High Chamber, because not all the conspirators are presented and the provisions adopted in these bodies can damage their plans deep inside”, *ibidem*, pp. 185, 186.

⁴² The Duke of Frías gave the example of the French Chamber, that had been discredited after the riots of Lyon and Paris of 1834, *ibidem*, pp. 269, 270.

The objections of the Members of Parliament and Senators were directed principally against the 3rd section of Article 6, which granted the Senate competence to indict individuals within its rank and file. Perpiñá, Pacheco and Seijas raised objection in Council, requesting the strict recognition of the limits of senatorial jurisdiction. As a result, the wording of Section 3 of Article 6 was modified, adding that the Senate would judge those individuals within its rank "in those cases and in such manner as determined by the laws"⁴³. This modification brought about the modification of what was established in Art. 42 of the Constitution in reference to the prosecution and arrest of Senators, establishing that "Senators shall not be prosecuted nor arrested without the prior resolution of the Senate, unless they were found *in fraganti*, or if the Senate was not in session, and that the Senate would have to be informed as soon as possible, in order to determine what action to take".

But what really stands out as being important in the debate in the Council was the objections presented in reference to the need for senatorial jurisdiction. Pacheco and Seijas came out against it⁴⁴. Rodríguez Vaamonde and González Romero responded to these allegations, for the judging Commission, and Pedro José Pidal, on behalf of the government. They justified it because of the need to guarantee the independence of the corporation and to provide it with all of the dignity that corresponded to it as the principal Court of the Kingdom; consequently, senators could only be judged by senators, with their competence not being extendable to the Council for the temporal duration of the position of Member of Parliament, in line with what is established in other European countries⁴⁵.

With the Project for constitutional reform approved by both Houses, the new Constitution was promulgated on 23 May in the year 1845. In its Art. 19, the judicial functions of the Senate were established with an amplitude that was not to be repeated in any other subsequent Spanish constitutional text⁴⁶. It recognized for the Senate the faculty to judge Ministers when they were accused by the Council (art. 19, 1st). In order to know of serious offences against the person or the dignity of the King, or against the security of the State, in accordance to what was established by the laws (art. 19, 2nd) and in order to judge those individuals within its rank and file in those cases and in the manners determined under the laws (art. 19, 3rd).

⁴³ DSCC, 1844–1845, pp. 587–593. Analysis of the discussion in Enrile Aleix, *El Senado en la Década Moderada*, pp. 138–139; Bertelsen Repetto, *El Senado en España*, pp. 238, 239.

⁴⁴ Seijas said: Why establishing such an institution if it is strange among us and would not be well seen as it does not have the confirmation of the nation; it is not necessary, not advisable after reflection and not demands by the circumstances?, DSCC, 1844–1845, pp. 587–589.

⁴⁵ DSCC, 1844–1845, pp. 590–593; Enrile Aleix, *El Senado en la Década Moderada*, p. 140; Bertelsen Repetto, *El Senado en España*, p. 239.

⁴⁶ Neither the Constitution of 1869 nor the Constitution of 1876 accepted the judicial functions of the Senate as wide as the one of 1845. Both were limited to judge Ministers after accusation from the *Congreso*.

3.2. The Law of jurisdiction and indictment of the Senate of 11 May 1849

On the 23 of November of 1847 the Government presented before the House the “Bill for Indictment in those cases in which the Senate was constituted in Court, in accordance with what is set forth in the Constitution”⁴⁷. Jointly, the Chamber examined a bill elaborated by Luis Silvela on the same material, and the Bill under ministerial responsibility which was drawn up in the era of the Royal Statues, which were never passed and referred to previously⁴⁸.

In the exposition of Reasons for the Bill, the Government began pointing out the difficulty in drafting such a bill and indicated the four cardinal bases for the same: competence of the Court of the Senate, organization, type of procedure, and exceptional requirements that would have to be observed in the accusation of Ministers⁴⁹.

Insofar as competence was concerned, this was limited to what was established in art. 19 of the Constitution, and the Government pointed out the difficulty of specifying the offences that would have to be considered as very serious and thereby justify the intervention of the Chamber (art. 19, 2nd), as well as the need to carry out a prior classification which would have to be part of the Penal Code that was being debated at the same time in the Courts⁵⁰. As an innovation, they introduced, in the case of offences committed against the person or security of the Monarch and the security of the State (art. 19.2nd), the requirement that it be the Government who, by means of a Royal Decree, agreed in Council of Ministers, would convene the Upper House as Court⁵¹. Evidently, the political nature of the bill stood out. Nature which would appear to be confirmed in the configuration of the same, which was constituted as a special court, within the judicial order, whose decisions could not be revised by other higher courts, given its composition and rank. Insofar as the competence to judge the Ministers when they were accused by the Council was concerned (art. 19, 1º), the determination of the cases of accusation was left to “the prudence” of this House, departing from other foreign Constitutions which restricted it to offences of treason and concussion. With this accusation was extended to any criminal action that a Minister could commit in the exercise

⁴⁷ DSCS, 1847–1848, No. 6. Ap. 1º.

⁴⁸ *Ibidem*, No. 6, Ap. 3.

⁴⁹ DSCS, 1847–1948, No. 6, Ap. 1, p. 31.

⁵⁰ “The Government... finds convenient to leave to this Code (Penal), the definition of failures and crimes that belong to the Senate jurisdiction” (*ibidem*, p. 32). The Penal Code the Government was referring to was the one of 1848 that was in the discussion phase at that moment. The Code was written by the Codification Committee in 1843 and presented to the Government in December 1845, being definite and approved on the 19th March 1848. See point 4 of this report.

⁵¹ This decision was justified saying that the Government “is the only power able to collect more news about the attempt and the circumstances that may contribute to increase or decrease its transcendence... None... but the Government can better know if the description of crime demands meeting the circumstances and the trial to be celebrated in the Senate”, DSCS, 1847–1848, No. 6, Ap. 1º, p. 32.

of his office⁵². In accordance with what was set forth, the double intention of the Government was revealed: extend the jurisdictional range of the Senate and the use of discretionality, a tendency which was to be extended even more when it came up for discussion in the Houses and is reflected in the text that was finally approved.

Finally, the Bill presented by the Government organized the public trial of the Court of the Senate by means of an extraordinary procedure, distinct from the ordinary penal procedure, which made it possible for the action of public opinion to play a role⁵³.

The Committee of the Senate in charge of informing on this Bill for judgement of the Senate made hardly any modification whatsoever⁵⁴. During their debate the importance and need for this law was emphasised⁵⁵, as well as its innovative character on an international level, as there was no other similar law in countries with such consolidated parliamentary tradition such as then were France and England⁵⁶. The principal objections fell on the tendency to the amplification of the jurisdictional function and the convening by the Government⁵⁷.

The presentation of an amendment which considerably extended the jurisdictional functions of the Senate adding to it the knowledge of attempts against the life or person of the king or of the immediate successor to the Crown and the conspiracy to commit these crimes, and of the crimes of treason and rebellion brought about the suspension of the discussion. A new Commission was appointed, which drafted a new report introducing modifications to the previous one⁵⁸, and this was remitted to Council on 9 March 1848. The report which was drawn up by the Commission of this House introduced important modifications to that which was regulated by the Senate; reduction of the competencies established in art. 19: exemption of the Senators of military condition to those offences which were purely military; extension of the right of challenge not only to the accused but also to the accuser; and the obligation to hand down sentence, which had to be motivated, limiting the sentence to those established under the law, graduating them in accordance to that which was established under the law⁵⁹. Among the interventions of the Members of Parliament, that which was made by Gómez de la Serna stands out, dedicated to demonstrating how the Bill exceeded the competencies attributed by the Constitution, as well

⁵² *Ibidem*, p. 33.

⁵³ *Ibidem*, p. 32.

⁵⁴ DSCS, 1847–1848, No. 23, Ap. 1°.

⁵⁵ DSCS, 1847–1848, No. 25, p. 373.

⁵⁶ “The Lords in England and the same in France, do not have any law regarding this and have enough with what it is said in the regulations. However, we wanted to... create a law”, DSCS, 1847–1848, No. 24, p. 360.

⁵⁷ *Ibidem*, p. 360 and No. 25, pp. 369.

⁵⁸ *Ibidem*, No. 32, Ap., pp. 517–522.

⁵⁹ DSCC, 1848–1849, pp. 25 and 1429–1432.

as the need for a law covering ministerial responsibility which would contribute to delimiting them with greater precision⁶⁰. In rebuttal, Calderón Collantes expounded on the special court nature: political, insofar as was concerned the qualification of the offences and the evaluation of the evidence; and court of justice, in the application of the sentences⁶¹.

The modifications introduced in the Council made it necessary to appoint a mixed Commission from both Houses, whose report⁶² was accepted and sanctioned on 8 May 1849, i.e., a year and a half after the bill had been presented⁶³. This law was to remain in force until the suspension of the Constitution in 1876, although with partial repeals due to the restriction of the judicial competencies of the Senate carried out in later Constitutions.

The law aroused the interest of jurists and contemporary legal journals. Francisco de Cárdenas in *Derecho Moderno* involved himself not only in the analysis of the Government's Bill, but also in the Sentence handed down by the Senate and the bill introduced by Silvela. He pointed out the exceptional nature of the jurisdiction of the Senate and evaluated the advantages of removing the knowledge of offences characterized in art. 19 to the ordinary courts. He also emphasized the drawbacks of the inherent publicity in these trials. On the other hand, he opposed the Bill which was drafted by Silvela⁶⁴.

The legal text on the jurisdiction of the Senate of 1849 consisted of three titles and sixty-six articles. Within this text two extremely important procedural principles were established; the publicity of the procedure and the separation in the voting of the court of fact and the court of law, with the inherent advantages of trial by jury⁶⁵.

Title I focussed the first Section on the *Jurisdiction of the Senate*. Article I covered the jurisdictional competencies the Constitution of 1845 had attributed to the Upper House. Competencies in reference to person: judge the Ministers accused by the Council, find out about all of the offences committed by the Senators who had been sworn into office. If it happened that when a Senator enjoyed the condition of being a military person and had committed an offence while on campaign, the competent court in accord with military laws and ordinances would be allowed to hear the case. In the same way, ecclesiastical senators would be tried, for purely ecclesiastical offences and crimes, by the courts of this jurisdiction, in accord with the canons of the Church and the laws of the Kingdom (art. 3). By means of the material at hand, by virtue of Royal Decree, knowledge would be obtained about the cases on serious offences

⁶⁰ *Ibidem*, pp. 1482–1485.

⁶¹ *Ibidem*, p. 1485.

⁶² *Ibidem*, No. 84.

⁶³ DSCC, 1848–1849, No. 92, Apéndice 2º.

⁶⁴ Francisco de Cárdenas, *De la naturaleza y límites de la jurisdicción del Senado cuando se constituye*, in *Tribunal de Justicia*, in *El Derecho Moderno, Revista de Jurisprudencia y Administración*, Madrid 1848, vol. IV, pp. 3–23.

⁶⁵ Enrile Aleix, *El Senado en la Década Moderada (1845–1854)*, p. 251.

against the King and the security of the State. In all of these cases, the Senate would have knowledge not only of the main offence, but also of all those related offences (art. 2).

In respect to the *composition and Organization of the Senate as a Court*. Sections Two and Three of Title established that it would be made up of the Senators of the State who had been sworn into office, and presided over by the person who was at the time President of the Senate (art. 4), assisted by the senators that the House had elected for the position of commissioner, invested in the attributions that the president had delegated to them (art. 6). The office of Public Prosecutor would be carried out by a commissioner appointed by the Government, by Decree, agreed in a Council of Ministers (art. 8). Ecclesiastics would be excluded for reasons of Canonical Law (art. 11). Senators who had been appointed after the realization of the actions that were the cause of the jurisdictional action of the House could not be a member of the court (art. 12).

In Titles II and III of the Law of Jurisdiction, the process to be followed for the actions before the Senate Court was regulated. The *procedure* to follow was regulated in two phases, preliminary and plenary. The first was opened by means of Royal notification (art. 10). This notification could originate as a result of the formalities carried out before any court or tribunal which upon coming into knowledge of the same, should find that the offences involved are offences which are attributed to the jurisdiction of the Senate, in which case the Judge would remit the action to the Ministry of Justice (art. 18).

Once the House had been constituted as a Court, the President of the same designated the Senators responsible for being present as deputy judges. These commissioners and the President carry out the material formalities, and no one can excuse themselves on the grounds of jurisdiction except the Royal Family (art. 14). This Court is recognized as having the possibility of taking care of all of the legal aspects of proof except for that of confession (art. 13). The President can delegate the carrying out of formalities to the ordinary judges (art. 15). In this way the preliminary instruction was carried out by a collegial organization, made up of senators and the number commissioners would always be the number in order that the vote of the President would be decisive.

With the summary concluded, the Commissioner designated by the President would inform the House, and the Court would declare the summary to be concluded or the indispensable formalities (art. 17). If there were any doubts about the competence of the Senate, the President had to submit the prior question of competency to the House (art. 19). Finally, within a period of 3 to 8 days, the Senate, in closed door session, by means of secret vote, would declare whether or not there was reason for accusation; absolute majority of the Senators present was necessary (art. 20–21).

The full session phase appears under the heading *On the order to follow in the public trial*. It established that once the defence for the accused or public defender has been named (art. 22), the secretary would turn over a copy of the

summary to the prosecutor and another to any of the accused (art. 23). The law mentions in art. 25 in which way the prosecutor should effect the written report. It also indicated to the accused the time period allotted for the description of the defence, indicating that it could not be less than ten days, and that the description would be turned over to the prosecutor together with the list of the witnesses and Senators that were to be tried. The accused could reject up to a tenth part with having to indicate the cause (arts. 24–28).

The hearing would have to be public, the accused and his defenders present (arts. 29 y 36). Once the examination of the witnesses and the evidence was concluded, the prosecutor would proceed to inform and give his conclusions, allowing for cross-examination between the accused and the defence (art. 37). In secret session, and after summary of the interventions and upon proposal of the President or of the commissioner in whom authority could have been delegated, the Senate is asked, “Is the accused guilty of the offence he has been charged with?” (art. 38). In the voting on the qualification of the facts, the Senators will obey the dictates of their consciences (art. 42). The voting for the declaration of guilt and the imposition of sentence had to be carried out separately (art. 43), requiring different majorities depending on whether or not they coincide with the petitions of the prosecution (art. 44 45, 46, 47), except when the death penalty is proposed, in which case the approval of three fourths of the Senate was necessary (art. 48).

The sentence had to be well-reasoned and could not impose more penalty than that which was stipulated by law. It was dictated by the President, without the presence of the accused, who was notified and a copy was sent to the Government in order for it to be carried out (art. 51). When the accused was not present, the trial would be substantiated in his absence (art. 52). If in the sentence he was sentenced to reparation of damages or indemnity for damages, it would be the civil courts in charge of the carrying out of fixing of the indemnity if it had not already been stipulated (art. 50). The rulings of this Court, due to their special condition, were unappealable and final.

Title II of the law regulated the *Specific regulations related to trials against Ministers*. These regulations included the processing that the Regulations of the Chamber of Deputies had established in Title XIX of the same⁶⁶. A bill was to be drawn up in the Chamber of Deputies that would follow the processes of a law (art. 55); if it was agreed there were grounds for an accusation, a commission of Deputies would be named which would sustain it before the Senate (art. 56); the Senate would not proceed upon the declaration of whether or not there were grounds for accusation (art. 65). Finally, when the Council ceased to exercise its functions, the Commission that had been named in order to sustain the accusation would continue to carry out its functions until the termination of the trial (art. 66).

⁶⁶ *Reglamento interior del Congreso de los Diputados (Internal Regulations of the Council of Ministers)*, 4 (May) 1847.

4. The Calderón Collantes trial as a document of application of the jurisdiction of the Senate and of the Penal Code of 1848

4.1. The Calderón Collantes Trial

The law of jurisdiction of the Senate would have effective application, for the first time, in 1859 on the occasion of the trial against the ex Minister of Development Agustín Esteban Collantes. This trial shows a double interest. On the one hand it demonstrates how a trial which was apparently penal was in reality covering up a political trial. Secondly, it represents an important example of the application of a fundamental regulation of the Moderate Decade, the Penal Code of 1848 recognized as the basis for later Spanish Penal Codes up to the currently in force code of 1995, and in large part of the Hispano-American Penal Codes.

The events that brought about the trial in 1853, during the reign of Isabel II, in the Government presided over by José Luis Sartorius, Count of San Luis (19-9-1853 to 19-7-1854), as a result of a contract for 130,000 loads of stone for works on the canal of the Manzanares River, which were never carried out. The contract was drawn up, with no prior tender, with Ildefonso Mariano Luque, who collected the bank bonds, which were the price of the service (975,000 *reales*) and turned them over to Mr. J.M. Mora, Director General of Public Works, in his home, where he signed a blank endorsement of whom the beneficiary was Mr. J.M. Pastor, brother-in-law of the Director General. The supply was certified by J.B. Beratarrechea, separating the corps of engineers from the intervention that corresponded to them in the accounts and expenses for the canal. The participation of the Minister consisted in the signing of three Royal Orders. The first, dated 28 August 1853, arranging for the contracting of stone, whose processing and execution corresponded to the Director General of Public Works. The second, ordering the payment, dated 10 May 1854. And, the third, dated 20 June of the same year, ordering, in conformity with the Minister of the Treasury, a budgetary extension in order to liquidate the amount of the contract even though the service had not been executed⁶⁷.

The events go back to a formal complaint presented by an assistant of the Regulation of Payments, Julián Pardo, who between 1858-1859 brought to the attention of the Chief Regulator the existence of serious irregularities in the contracting for stone, effected in 1853. In the face of the disqualification by

⁶⁷ *Senate constituido en tribunal de justicia. Vista pública del proceso instruido contra el Excmo. Sr. D. Agustín Esteban Collantes, Ministro que fue de Fomento, contra D. Juan Bautista Beratarrechea y D. Ildefonso Mariano Luque, y contra el no ausente y declarado en rebeldía Ilustrísimo Sr. D. José María de Mora, Director que fue de Obras Públicas, acusados por el Congreso de los Seres. Diputados, como perpetradores de varios delitos con motivo de una supuesta contrata de 130.000 cargos de piedra*, Edición oficial de la Redacción del Senado, Madrid 1859, pp. 102, 103; Nieto, *Causa del señor Collantes: ¿Drama o Farsa?*, in *Los Grandes procesos de la Historia de España*, Muñoz Mercado (ed.), Barcelona 2002, pp. 359-386, pp. 359, 360.

this person, it was brought to the attention of the then Minister of Development, who ordered the opening of a clarifying expedient to the Civil Governor of the Province; a later on to the press⁶⁸. M. Cortina, in the defence of E. Collantes, brought to light the irregularity of the denunciation of Pardo, the period of time that had gone by between this and the commission of the acts that were denounced (more than five years), and the unusual nature of the recourse of the Governor, as the logical thing would have been for the clarifying expedient to have been dealt with by the court of first instance⁶⁹. On the 14 of February in 1859 a Bill was presented in Council, signed by Sagasta and six other progressive members of parliament, requesting that the dossier for contracting be requested from the Minister of Development, based on arguments of morality⁷⁰; the head of the Government at that time, the Count of San Luis, indeed manifested in his appearance before the House, that the summons was based on political motivations⁷¹.

The bill presented by Sagasta was approved and transferred to the Council, where it was presented a Bill requesting the accusation of E. Collantes and co-authors, demanding responsibilities before Council in accord with the Law of Jurisdiction of the Senate as Court of 1849. The special Commission named for this purpose presented a favourable report for the accusation, and in spite of the defence carried out by E. Collantes, in a previous hearing, it was approved by majority to bring the accusation before the Senate. In accord with what had been established by the law of 1849, on the 14th of April in 1859, an accusatory Commission was named, presided over by Fernando Calderón Collantes and, on a second level, by Antonio Canovas del Castillo⁷². At the same time, the Senate constituted a Court of Justice, presided over by the Duke of Veragua and made up of the most prominent members of the aristocracy, of the political area and the Legal area (curiously the drafters and commentators of the Penal Code of 1848 were part of this same court). M. Cortina, a prominent politician and progressive lawyer, famous for accepting the defence of his political enemies, acted as defence for the Minister⁷³; and González Acevedo, as co-defence. Álvarez Sobrino defended Luque and Valeriano Casanuevas, Beratarrechea⁷⁴.

On the 19 of May the document for the accusation against E. Collantes, Beratarrechea and Luque was presented with the following conclusions: It was considered that the crimes of fraud, criminal deception and falsehood had been

⁶⁸ *Senado constituido en tribunal de justicia*, pp. 11–28.

⁶⁹ *Ibidem*, pp. 215.

⁷⁰ DSCC, 1858–1860, pp. 873–892.

⁷¹ *Ibidem*, p. 888.

⁷² Ruiz Cortés y Sánchez Cobos, *Diccionario biográficos de personajes históricos del siglo XIX español*, Madrid 1998.

⁷³ *Senado constituido en tribunal de justicia*, pp. 207; J. Rico y Amat, *Diccionario de los políticos*; Ruiz Cortés y Sánchez Cobos, *op.cit.*

⁷⁴ *Ibidem*, p. 207.

committed. The above mentioned were committed for trial under the concept of authors. The imposition of sentences of temporary custody in the maximum degree and a fine of *one thousand duros* for the first two accused were handed down, and Luque was sentenced to the maximum degree and a fine of *one thousand duros*, in accord with what was established in the then current Penal Code. In the face of Mora's failure to appear, the accusation reserved the classification of the offences and the sentences in which it appeared he had incurred for when he presented himself before the court or the court declared him to be in default⁷⁵. The final sentence declared E. Collantes, Beratarrechea and Luque guilty, and the Director General of Public Works, Mr. J.M. de Mora guilty of the aforementioned offences⁷⁶.

4.2. The exegesis of the Penal Code of 1848

Throughout the trial the interventions of the accusation and the defence demonstrated an extraordinary knowledge of the penal legislation that was then in force, the Penal Code of 1848, in its reformed version of 1850⁷⁷. During the sessions a number of reference were made to the interpretation of the same, based on the works of its principle commentators.

One of the important contributions of the Code has been the definition of offence, which, with few variants, has been maintained not only in posterior Spanish Penal Codes, and in the currently in force Code of 1995, but also in the Hispano-American codes⁷⁸. An offence is defined as "any wilful action or omission punishable by the law" (art. 1), emphasising as essential element of the same the idea of voluntary, understood by the doctrine as liberty, intelligence and intention⁷⁹. This conception was used in the trial in order to demonstrate the innocence of the accused. The accusation centred on the signing of the three Royal Orders with those that the Minister authorized the contract and the payment: "The responsibility of the Minister is in what he signs"⁸⁰. The defender Manuel Cortina⁸¹, concentrated on demonstrating the penal irresponsibility of the Minister for the documents that he signed. Taking into account the accumulation of work in the Ministry, it was materially impossible that he could

⁷⁵ *Ibidem*, p. 48.

⁷⁶ Study of the phases of the Project in Nieto, *Causa del señor Collantes*, pp. 369–383; Coronas González, *El Senado como Tribunal de Justicia*, pp. 186–195.

⁷⁷ See M.D. Sanchez González, *La Codificación penal en España: los Códigos de 1848 y 1850*, Madrid 2004; E. Iñesta Pastor, *El Código Penal español de 1848*, thesis, Universidad de Alicante, 2005 (in newspaper).

⁷⁸ E. Iñesta Pastor, *La proyección hispanoamericana del Código Penal Español de 1848*, in *Estudios. Actas XIII Congreso del Instituto Internacional de Historia de Derecho Indiano*, Puerto Rico 2003, vol. II, pp. 493–521.

⁷⁹ Pacheco, *El Código penal concordado y comentado* (1st Ed.), vol. I, pp. 79–81.

⁸⁰ *Senado constituido en tribunal de justicia*, pp. 112, 130.

⁸¹ Manuel Cortina was President of the General Committee of 1843 for Codification that created this Code, *ibidem*, p. 225.

be aware of the content of the same, and therefore there had been a breach of trust on the part of the Director General Mr. J.M. de Mora, and in the Minister absence of wilful intent, and therefore, of any offence. He cited in his support the commentators of the Code, (curiously some of them were members of the Senate), and made a detailed study of the circumstances exempting responsibility (art. 8), — considered to be another of the great contributions of the Penal Code of 1848⁸² — with exceptions to the liberty, intelligence and intention, and therefore, wilful intent⁸³. The same argument was repeated by Álvarez Sobrino in the defence of Luque, based on the ignorance of criminality of the fact on the part of his defendant, which determined the lack of wilful intent, and therefore, his inculpability⁸⁴.

A detailed analysis was also made of the penal concept of responsibility. For the accusation, dealing as it did with the defrauding of the State, for which the three Royal Orders had been necessary, the Minister executed acts without which the offence would not have been committed. And this brought about the distinguishing between the instigators of the offence, those who had conceived of it: the ex Minister (irrespective of whether or not they had been able to benefit economically from it) and J. M. de Mora; and the material executors: Luque and Baraterrechea. For this it was based in art. 12, 3rd of the Penal Code where the one who is configured as being the author is the one who provides the necessary assistance for the commission of the offence: “those who cooperate in the execution of the fact, by means of an act without which it could not have been carried out”. But even if it were possible that the person was not the author, he was an accomplice for having concurred in some other way in the perpetration (art. 13), or was responsible in any case of criminal negligence, for having for having executed an act, mediating malice, constitutive of a serious offence (art. 480)⁸⁵.

It was González Acevedo, co-defender of the Minister, who denied the responsibility of the same as author of the offence which had derived from the Royal Orders, imputing responsibility for the offences to the Director General Mr. J.M. de Mora. There was no profit, so therefore there had been no offence. Besides, the Minister was the one responsible for what was ordered in them and not for the breaches and illegalities that were subsequently committed in the execution of the same. He did admit that there had been a failure to comply with the required formalities. Consequently, the only one responsible was Mr. J.M. de Mora⁸⁶.

The defendants were accused of the commission of the offences of criminal deception, falsehood and fraud. With the aggravating circumstance of having

⁸² Antón Oneca, *El Código penal de 1848 y Don Joaquín Francisco Pacheco*, Anuario de Derecho Penal y Ciencias Penales, 18, 1965, pp. 473–495.

⁸³ *Senado constituido en tribunal de justicia*, pp. 224–226, 254 ff.

⁸⁴ *Ibidem*, p. 175.

⁸⁵ *Ibidem*, pp. 102, 129, 132.

⁸⁶ *Ibidem*, pp. 140, 143, 148, 153.

been committed by civil servant in the case of the ex Minister, the Director of Public Works and the administrator for the canal, and by a private party in the case of Ildefonso Luque.

The Penal Code of 1848/50 depicted the falsification of public or official documents in Book II, Title IV. Chapter IV introduced the innovative structure which was subsequently maintained. As falsification of documents it is understood, among other acts, the drawing up of a document in which the reality is not faithfully reflected, lacking truth in the narration of the facts (art. 226). As official documents they are understood as those which have been authorized by the Government, authorities or employees with the authority to do so⁸⁷. The punishment for falsification of public documents varies depending on the condition of the delinquent. This is aggravated if the person is a civil servant, imposing sentence of temporary imprisonment and a fine of up to 1,000 *duros* (art. 226), and this is reduced to a prison sentence and fine of the same amount if the offence is committed by a private party (art. 227), a sentence justified by the doctrine of the social alarm produced in the first case⁸⁸.

The offence of Fraud is imputed in like manner. The Code of 48 deals with these offences in Title VIII, dedicated to offences committed by public employees, regulated under great detail, thus reflecting the importance conceded to this type of offences. The Code distinguishes between common or special offence, depending on whether they are committed by any public employee or by a specific class. The first are integrated by a series of facts common to all public employees irrespective of their class or category, and among these is included fraud. Art. 323 penalized the public employee who, intervening due to his post or office in the commission of supplies, contracts, adjustments or liquidations of public effects, makes arrangements with the interested parties or speculators or uses any other artifice in order to defraud the State (art. 323). There are two fundamental elements, on the one hand theft or fraud from or of the State, and on the other the abuse of functions or power is committed. Pacheco alluded to punishment for these offences for reasons of public morality, emphasising that they could be committed by persons ranging from Ministers to the lowest subordinate⁸⁹.

Finally, they were accused of criminal deception. The Code of 48 included them within offences against property, regulating them in a very detailed manner. Criminal deception was characterized, for example the deception that induces in error that becomes a mechanising act of the one affected in favour of a third party, with a special relationship existing between the fraudster and the defrauded party. The Code regulates deception in art. 449, punishing the person who defrauds another in substance, quantity or quality of the things that are given over *in virtue of obligatory title*. The commentators understood as

⁸⁷ Pacheco, *El Código penal concordado y comentado* (2nd Ed.), 1856, vol. II, pp. 302, 313; Vizmanos y Alvarez Martinez, *Comentarios al Código Penal*, Madrid 1848, vol. II, p. 166.

⁸⁸ Pacheco, *op.cit.*, vol. II, p. 315.

⁸⁹ *Ibidem*, p. 944.

obligatory title any onerous title, specifically any delivery that was not in virtue of a gracious or voluntary donation⁹⁰. This is also the case of the party who defrauds others, using a fictitious name, attributing power, influence or supposed qualities to himself, feigning possessions, credit, commission, business or imaginary negotiations, or taking advantage of any other similar deception (art. 450). Under this article, acts such as taking money, things of value or any other useful thing from another, feigning to be what one is not, attributing something which is false and simulating what one does not possess are punished⁹¹. In both cases, the sentence is established proportionally depending on the amount of the fraud. Pacheco stressed the frequency with which in order to prepare the criminal deception other offences were committed, above all falsehoods.

From the analysis carried out on the types of offence described, it becomes clear that the accused were defendants of themselves. The falsehoods of the Royal Orders were necessary elements in order to commit the offence of criminal deception, and it was equally clear that the fraud committed was in detriment to the State. But as we have already stated, the defence was centred in the demonstration of the absence of culpability in the cases of the ex Minister and of Luque; and in the case of Beratarrechea in the lack of evidence. All of the culpability was transferred to the absent defendant, declared to be in fault, the Director General. And this is the opinion that was reflected in the sentence. In spite of the impact that the trial had in the European press, the political career of the ex Minister was not seen to be affected.

What stands out in the trial is the emphasis which was placed, (by the accusers as well as by the defendants), in demonstrating that this was dealing with a common penal trial and not a political one⁹². The political background of the same corroborated by the political vicissitudes of the moment was however evident: with this trial, the Government of a Liberal Union pretended, on the one hand, to destroy the opposition of the Moderate Party, which was once again gaining strength, after some years of political decadence which had been exceedingly contributed to by the political and administrative corruption that had come about around the railroad and other businesses. This also propitiated the revolution of July of 1854 and brought about the Liberal Biennium. On the other hand they were trying to divert attention, as the Government itself was during these times being questioned about administrative immorality⁹³. The surprising current nature of this trial is evident, as is the appeal to practices derived from the structure of the Administration itself⁹⁴. All in all, political responsibility was being pursued under the protection of penal responsibility.

⁹⁰ Vizmanos y Alvarez Martinez, *Comentarios al Código Penal*, vol. II, pp. 491–493.

⁹¹ Pacheco, *El Código Penal Concordado y Comentado*, vol. III, p. 353.

⁹² *Senado constituido en tribunal de justicia*, pp. 102, 117, 118.

⁹³ D. Sevilla Andrés, *Historia Política de España*, vol. I, pp. 200, 220 ff.

⁹⁴ A. Nieto, *Causa del señor Collantes: ¿Drama o Farsa?*, pp. 383–386.