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Nere Jone INTXAUSTEGI JAUREGI, PhD\*

## LAW, PUNISHMENTS AND SANCTIONS IN BASQUE LAW: AN APPROACH TO THE CRIMINAL LAW OF BISCAY

*This paper is focused on the study of punishments and sanctions in the Basque legal system. Specifically, regarding the territory of Biscay and the various laws, norms and ordinances that were in force from the 13<sup>th</sup> to the 19<sup>th</sup> century.*

*Firstly, there is a presentation of the territory, whose capital city is Bilbao, and the different laws and regulations that were used in that period. All of them are of Basque origin and were used exclusively in this territory. Next, the most common punishments and sanctions are discussed. Moreover, concrete examples, covering trials which took place during those centuries, are given. In order to do so, documents from different archives are used. I consider the latter to be very important as that documentation is the practical reflection of the legal theory.*

*The objective is to give an overview of Basque criminal law from a theoretical point of view, but also its application in the examples that can be found in the archives.*

Keywords: *Basque Law. – Biscay. – Fuero. – Punishment. – Early Modern Age.*

### 1. A BRIEF HISTORY OF BISCAY AND ITS LEGAL SYSTEM

The Basque territories are situated in the western Pyrenees, straddling the Spanish and French border. It comprises seven parts: Álava, Biscay, Gipuzkoa, Labourd, Lower Navarre, Navarre, and Soule. The population of this region shares a common language (Basque) and customs, but there has never been a political unity among the seven territories nor a legal unity. Therefore, it is necessary to make an individual approach to each

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\* Associate professor at the University of Deusto, nere.intxaustegi@deusto.es. This paper was presented at the International Student Conference on Legal History „Iustoria 2023: Law and Punishment“, Faculty of Law of the University of Belgrade, Belgrade, Republic of Serbia, 2023.

territory. It has to be pointed out that this paper focuses only on the territory of Biscay, its history, legislation, and judicial institutions.

It is in the *Chronicle* of King Alfonso III (c. 852–910), written around the year 880, that the name *Bizcai* is mentioned for the first time in History.<sup>1</sup> Later references reflect that, circa 1040, the territory was under the feudal control of a noble, the Lord of Biscay. In 1370, *infante* Joan, son of King Enrique II of Castile, was named Lord of Biscay, and, when he was named King of Castile in 1379, Biscay was incorporated into the Crown of Castile.<sup>2</sup> From that moment on, all the monarchs of Castile and later of Spain have held the titles, among others, of King of Castile and Lord of Biscay. However, Biscay maintained its laws and institutions. This fact shows that King/Lord Joan wanted to maintain the seigniorial character of Biscay, without merging it fully with the kingdom.

This situation lasted until 1876, when, at the end of the Third Carlist War (a civil war that lasted 1872–1876), as a punishment for not fighting on the side of the triumphant monarch Alfonso XII, Biscay not only lost its laws and institutions, but it was integrated into the Spanish legal-administrative regime (maintaining an autonomy that lasts to the present day).

The *Juntas Generales* is the legislature of Biscay. It is an assembly that was held in the town of Guernica, and it had the authority to pass laws, which are listed below. Today the *Juntas Generales* still exists, but it has different functions and a completely different organization.

Biscay had many laws. The following is the list of all the laws that formed part of the Biscayan legal system until 1876.

- Fueros de las villas y ciudad (11–14<sup>th</sup> centuries)
- Fuero de los Labradores de Durango (13<sup>th</sup> century)
- Fuero Antiguo de la Merindad de Durango (14<sup>th</sup> century)
- Cuaderno de Juan Núñez de Lara (1342)
- Ordenanzas de Gonzalo Moro (1394)
- Fuero de Avellaneda (1394)
- Capitulados de Chinchilla (1483 & 1487)
- Fuero de las Encartaciones (1503)
- Fuero del Albedrío (1503)
- Fuero Viejo (1452)
- Reforma del Fuero Viejo (1506)

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1 *Crónica de Alfonso III. Edición preparada por Zacarías García Villada*, Juntas para ampliación de estudios e investigaciones científicas. Centro de Estudios Históricos, Madrid 1918, 69.

2 Gregorio Monreal, “El Señorío de Vizcaya: origen, naturaleza jurídica. Estructura institucional”, *Anuario de Historia del Derecho Español* 43/1973, 146.

- Fuero Nuevo (1526)
- Escritos de la Unión y Concordia (1630)

Not all of these documents deal with criminal law. The most important law (and the one that was in force the longest) is the *Fuero Nuevo*, which is why it is the focus of this paper. Written in 1526 and approved by emperor Charles V in 1527, the *Fuero Nuevo* is considered the culmination of Biscayan law and it was used until 1876 (some sections on private law are still in force nowadays).

It should be highlighted that the territory of Biscay was divided into four zones:<sup>3</sup> three of them were rural whereas the remaining was urban. It is important to point out that the urban area (*villas* and *ciudad*) used Castilian law while the rural area used Biscayan law. The two legal systems are quite different, and the citizenship of each person determined which law they could and should use. Thus, the criminal law presented in this paper only had force in the rural area.

In addition to having its own laws and institutions, Biscay also had a distinct language: Basque. This language is completely different from Spanish in fact, it is a pre-Indo-European language.<sup>4</sup> However, the language used in writing was Spanish, since Basque was limited to the oral and personal sphere.<sup>5</sup>

## 2. CRIMINAL LAW IN BISCAY

As Jody Guetta highlighted, the *Fuero Nuevo* had a system of guarantees to protect the population against possible abuses by the judicial system.<sup>6</sup> The *Fuero Nuevo* is divided into 36 parts (*Título* in Spanish), and throughout these parts, it can be seen that the system of protection was based on three pillars: a set of guarantees, two procedures in the criminal law, and highly qualified judges in the Biscayan Law.

### 2.1. A set of guarantees

Some parts of the *Fuero Nuevo* collected information on procedural guarantees; it must be said that this protection and immunity crossed borders, since the Biscayans were also protected throughout the Spanish Empire, not only in the territory of Biscay. The most significant are as follows:

- 3 The urban area: *villas* and *ciudad*, and three rural areas: *Vizcaya nuclear*, *Duranguesado*, and *Encartaciones*.
- 4 First written testimonies of Indo-European languages arose during the Bronze Age.
- 5 Peter Burke, *Lenguas y comunidades en la Europa moderna*, Akal, Madrid 2006, 97.
- 6 Jody Guetta, *No excediendo, sino moderando. Garantías procesales en la normativa vizcaína del Antiguo Régimen*, Academia Vasca del Derecho, Bilbao 2010, 70.

Firstly, we should mention the *habeas corpus*. According to Title XI, Law 26, a person could only be arrested on the order of a judge (*que ninguno sea preso sin mandamiento de Juez*). Therefore, arbitrary detentions were not allowed. Thus, Biscayan law codified *Habeas Corpus* before the *Habeas Corpus Act 1679* of the English Parliament.

Secondly, there was a ban of torture (Title I, Law XII). The *Fuero Nuevo* prohibited the deliberate infliction of extreme and intense pain on a person (*que á Vizcayno alguno no se dé tormento alguno, ni amenaza de Tormento, directe ni indirecte, en Vizcaya ni fuera de élla, en parte alguna*). In addition, the use of torment, that is torturing a suspect against whom there was evidence, material or otherwise, to force them to confess or testify, was prohibited. This means that torture in Biscay had been banned long before the countries of the West banned it in the 19<sup>th</sup> century.<sup>7</sup>

Among other guarantees, there was also a prohibition of arrest for debts (Title XVI, Law III), inviolability of the home and family property (Title XVI, Law IV, and Title XI, Law XXV), or an appointment of a competent judge (Title VII, Law I and II).

## 2.2. Procedures

The *Fuero Nuevo* provided two procedures. The first one was the *ex officio* procedure, or in Spanish *procedimiento de oficio*, which is found in the Title VIII. As it can be read in Law I, this procedure was only used in a few specific cases, it could not be used in all criminal legal actions. These were the cases in which it was possible: thefts, forcing oneself on a woman, death of a foreign man who had no relatives in Biscay, begging along the roads, prostitution and pandering, libels, sorcery, heresy, high treason, counterfeiting of coins, and sodomy. Likewise, Law II mentioned bribery, while Law III referenced the blasphemers.

This *procedimiento de oficio* was characterized by a high degree of summarization, i.e., it was brief and the judge enjoyed great freedom of action.

In these cases, the punishment was to be in jail up to 30 days. However, if the judge considered it necessary, upon serving the sentence, the accused could be tried following the guidelines for the other procedure.

The second procedure is called *só el árbol de Guernica*, that is “under the tree of Guernica”. Guernica is a town founded in 1366<sup>8</sup> and is where the *Juntas Generales* were held. To this day there is a building of the Gen-

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7 Christopher J. Einolf, “The Fall and Rise of Torture: a Comparative and Historical Analysis”, *Sociological Theory*, Vol. 25, 2/2007), 101.

8 Pablo Picasso’s *Guernica* oil-painting refers to the Bombing of 26 April 1937 suffered by this town.

eral Assembly in Guernica, in front of which an oak tree is always planted, and that is precisely the tree to which this procedure refers. However, it was customary for these trials to be held in Bilbao, simply because the judge (*corregidor*) used to live in this city.

As it can be read throughout the Title IX, this process was carried out following this order. First, a complaint was filed; without a complaint from the victim or someone with knowledge of the crime, no case could be initiated. Once the evidence provided by the complainant had been accepted, and if the judge considered it appropriate, the accused was summoned. If there was more than one person in the accused party, all of them were to be informed. The accused party then had 30 days to take responsibility for the facts and present themselves in jail (there were two, one in Bilbao and the other one in Guernica).

The trial then began, with both parties presenting evidence and their witnesses testifying. In addition, the accused and the accuser also testified. It is important to note that these people came from Biscay, where the majority of the population did not speak Spanish, but Basque;<sup>9</sup> for this reason, the *Fuero* itself mentions the figure of the interpreter: *los testigos vascongados que no supieren la Lengua Castellana, los examine, y tome con otro Recetor, é Intérprete* (in English: the Basque witnesses who do not know the Castilian language, will be examined by an Interpreter). Finally, after the presentation of evidence and statements of the accuser, accused and witnesses, after 5–15 days, the judge gave out a sentence. The sentence could be appealed, and it was the *Juez Mayor de Vizcaya*, who was in Valladolid, who received the case.

### 2.3. Qualified Judges in the Biscayan Law

There were three instances in the judicial system of Biscay. The first instance was the local one: the *Alcalde del Fuero* (Mayor of Fuero). This post already existed at the time of the union with Castile in 1379,<sup>10</sup> which is almost 150 years before the *Fuero Nuevo* was written. This judge was the official of the local Administration of Justice, whose main function was to judge local cases, although not exclusively, because he also had governmental and executive functions within the rural councils. As it is reflected

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9 More information in Nere Jone Intxaustegi Jauregi, “Basque Public Notaries in Early Modern Age: Communication, Translation and Interpreting”, Albrecht Classen, (ed.), *Communication, Translation, and Community in the Middle Ages and Early Modern Period: New Socio-Economic Perspectives*, Fundamentals of Medieval and Early Modern Culture 6, Walter de Gruyter, Berlin y Boston 2022, 379–392.

10 Estanislao Labayru Goicoechea, *Historia General del Señorío de Bizcaya*, Biblioteca de la Gran Enciclopedia Vasca, Bilbao 1968, 713.

in the ordinances of the rural localities, the *fieles*, who were officers at the local rural councils (*anteiglesias*), were also in charge of civil cases of first instance in a variety of matters, such as restitution, possession and ownership of property, transfers of property, inventories, or verification of wills.<sup>11</sup>

The geographic scope of the second instance was all the territory of Biscay, and here the *corregidor* was the judge. The office was founded in Castile in 1348, and they were in charge of justice.<sup>12</sup> Gonzalo Moro was the first *corregidor* in Biscay<sup>13</sup>, an appointment that took place in 1394. So before this year, the Biscayan institutions themselves were in charge of criminal law. The *corregidor* was appointed by the Castilian monarchs and he was considered their royal representative. The *corregidor* of Biscay used to live in the city of Bilbao, where his Court (*Audiencia*) was, but he also went to Guernica, where he presided over the *Juntas Generales*. In addition, he had two assistants (*Teniente de Corregidor*) who lived in Guernica and Encartaciones, so that the population did not need to go to Bilbao.

Finally, there was the *Juez Mayor de Vizcaya*, that is Senior Judge of Biscay, to whom the cases that had been heard both by the *corregidor* and by other lower officers in Biscay were appealed. This judge had his headquarters in the city of Valladolid, specifically in the *Sala de Vizcaya* (Chambers of Biscay) at the *Real Audiencia y Chancillería de Valladolid*, which was the highest court of justice of the Crown of Castile. It should be said that the origin of *Juez Mayor de Vizcaya* is unknown and the first mention of this office dates from the year 1396, when Dr. Alfonso Rodríguez was appointed *Juez*.<sup>14</sup> That is to say, this officer influenced the legal future of Biscay since the Middle Ages. As of 1834, this *Real Audiencia y Chancillería de Valladolid* was suppressed, and the office of the *Juez Mayor* was abandoned.<sup>15</sup>

Both the *corregidor* and the *Juez Mayor* were not natives of Biscay. Moreover, they were of royal appointment. Therefore, they can be seen as an example of Castilian intervention in the legal system of Biscay.

11 Nere Jone Intxaustegi Jauregi, "Ordenanzas en las anteiglesias del Señorío de Vizcaya durante la Edad Moderna. Los casos de Abando, Baracaldo, Begoña, Ceánuri, Deusto, y Dima", *e-Legal History Review* 34/2021, 12.

12 Benjamín González Alonso, *El Corregidor Castellano (1348-1808)*, Instituto de Estudios Administrativos, Madrid 1970, 31.

13 Gregorio de Balparda, "Las Hermandades de Vizcaya y su organización provincial", *Anuario de Historia del Derecho Español* 9/1932, 193.

14 Cristina Emperador, "El archivo de la Real Chancillería de Valladolid y la Sala de Vizcaya: fondos documentales producidos por una sala de justicia en el Antiguo Régimen", *Clio&Crimen* 10/2013, 19.

15 Jacinto Martín Rodríguez, "Figura histórico-jurídica del Juez Mayor de Vizcaya", *Anuario de Historia del Derecho Español* 38/1968, 645.

### 3. SANCTIONS

As it is reflected in the documentation and court rulings, there were four most frequent sanctions: fine, prison, exile, and death penalty.

Firstly, a fine is the payment of a certain amount of money, imposed as a penalty for an offense as compensation. It used to be customary to impose fines in matters related to the roads, as it happened to the village of Dima, which was fined thirty *reales* for allowing wagons to travel and drag timber along the roads.<sup>16</sup> In addition, the fine was usually accompanied by one of the following other punishments.

Secondly, there is the punishment of imprisonment. The prisons were a space that the authorities hardly bothered to monitor, because *a priori* they did not seem problematic. The crimes that could take place in them were few: fights between prisoners, escape attempts, etc. However, it is more than likely that prisons were a hive where many assaults and robberies were planned. The accumulation of inmates, information exchange, crime programming, or gang recruitment took place inside prison walls.<sup>17</sup> In fact, there are documented escapes from the Bilbao prison, for example in 1711, when Juan de Zubieta, Santiago de Beraza, Cristóbal de Lecanda, Manuel de Bidaburu and Antonio and Gabriel de San Vicente ran away.<sup>18</sup>

It was very common to be detained before and during the judicial process, that is, to be in prison without having received any sentence. The reason was simple: having a defendant in jail was a lesser evil than their possible escape.<sup>19</sup>

As already said, there were two prisons in Biscay: in Bilbao, the capital city of the territory, and in Guernica, where the *Juntas Generales* were. There were many reasons why someone could end up in jail. For example, in 1648, Juan de Goiri was imprisoned because he was accused of rioting, in 1777 Marcos de Muñuzuri and Agustina de Zubieta, husband and wife, were arrested for cattle theft, and at the end of the 18<sup>th</sup> century Antonio de Urraza was imprisoned since he had been accused of murdering Pedro Ruiz.<sup>20</sup>

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16 Archivo Histórico Foral de Bizkaia, JCR1174/017.

17 Javier Enríquez Fernández, “Prevención, represión y sociedad a finales del Antiguo Régimen vizcaíno”, *Kobie Serie Antropología Cultural* 18/2014, 101.

18 AHFB, JCR0457/020.

19 Javier Sánchez Rubio, “Entre *aseguratio*, *coercio* y *executio*. Prisión preventiva y control judicial de las cárceles a finales del Antiguo Régimen”, *BFD: Boletín de la Facultad de Derecho de la UNED* 16/2000, 64.

20 AHFB, JCR1470/008; JCR1876/002; JCR2038/002.

Exile was another punishment, used by the peoples of the Iberian Peninsula even before the arrival of the Romans,<sup>21</sup> and this punishment continued to be used until the 19<sup>th</sup> century.

Exile was a measure to protect society from criminals who had not been sentenced to capital punishment, although they were guilty of the crime for which they had been tried. In other words, the aim was to rid society of dangerous individuals in a less traumatic way than resorting to the death penalty. Exile would become the alternative sanction to the death penalty.<sup>22</sup>

As the sentences reflect, exile was also a punishment widely used in Biscay in cases of public scandal, adultery and prostitution. Thus, for example, in 1769 María Javiera de Ortuzar and Francisca de Ugarte were sentenced for public scandal, whereas in 1781 the *corregidor* sentenced María Cruz de Oar Echabarría, who was a maid, Ana María de Zuricalday, wife of Agustín Suárez, who was a sailor, and María Antonia de Gacitua due to licentiousness and prostitution.<sup>23</sup>

Finally, there is the death penalty. As noted down in historical records, the convict, with their head covered, would be taken on foot or on the back of an animal from the prison to the place of execution, usually the central square of the town. They were accompanied by a town crier, who preceded the prisoner by reading aloud the crime committed and the penalty to be applied, so that everyone would know what awaited them if they committed the same infraction. Once they arrived at their destination, and before the eyes of everyone, the execution was carried out.

There were diverse types of executions, such as hanging, garroting, beheading, throat slitting, hanging, quartering, and burning at the stake.

The following is an example of how the *corregidor* sentenced the defendants with different punishments, since their degree of involvement in the same crime was not the same. A *beata*, a member of the semi-religious order of Beguines, called Magdalena de Anunçibay and who lived at the Santa Mónica community, was kidnapped, and in 1592, the *corregidor* sentenced the defendants. First, Tomás de Dóndiz was condemned to ride on a beast without a sling, with his hands and feet tied, and his head uncovered, while a crier was at his side shouting and making his crime public. The ride was destined for the gallows, where he would be executed. Likewise, half of his property would go to the religious community of Santa Mónica, and the other half to the King. Adrián de Arrien was the

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21 Manuel Torre Aguilar, "La pena del exilio: sus orígenes en el derecho romano", *Anuario de Historia del Derecho Español*, 63–64/1993–1994), 706.

22 Iñaki Bazán, "El destierro en el País Vasco (siglos XIV–XVI). La exclusión social a través del sistema penal", Iñaki Reguera (ed.), *Marginación y exclusión social en el País Vasco*, Universidad del País Vasco, Bilbao 1999, 27.

23 AHFB, JCR0495/005; JCR2918/025.



second defendant and he was sent to the galleys for eight years without pay; furthermore, if he did not perform the tasks at the galleys, he would be sentenced to death. Finally, the third defendant was Domingo de Arrien, father of Adrian; he was in prison, from where he would be taken out and mounted on a beast. He would also be taken on a ride while the town crier gave an account of his crime. Later, he would be flogged in public, receiving 200 lashes at the town square, and after that he was to be sent to exile for four years. In addition, the Arriens were obliged to pay, each one of them, 10,000 *maravedies*.<sup>24</sup>

The documented sanctions allow us to profile the defendants. For example, in relation to those accused of violence, males predominated as defendants, with 45% of the accused being between 20 and 29 years old, while that percentage drops to 27% among suspects aged 30 to 39. In addition, there is a predominance of married individuals (68 %) compared to single (26 %) and widowed (5 %). The profession of those accused of violent crimes is one of the best documented aspects. The most represented sectors are workers and craftsmen (including journeymen) and farmers and stockbreeders (both owners and landlords of farms) with about 30% of the defendants each. There is also a presence of sailors and fishermen (10%), servants (6%) and public officials (6%). Finally, with regard to their origin, it should be noted that 90% of the accused were from Biscay. In fact, most of the assaults took place in the place of origin of both the accused and the victim.<sup>25</sup>

#### 4. FINAL THOUGHTS

These pages have provided a short overview of Basque Criminal Law in the territory of Biscay. Specifically, the historical legal sources that were in force, but also the processes, the judicial instances, and the most common punishments that took place. In addition, real examples and cases have been collected in order to see the application of Law in everyday life.

Biscay is a territory that was part of the Crown of Castile, and this status explains its legal system: it had its own laws (among others, the *Fuero Nuevo*), but with certain Castilian interferences. And the Criminal Law is the perfect reflection of that circumstance: a law written in Biscay and by Biscayans, but with some Castilian participation, since the judges were of non-Biscayan origin (*corregidor* and *Juez Mayor*) and chosen by the Castilian monarchs.

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24 AHFB, Bilbao Antigua 0309/001/004.

25 Luis María Bernal Serna, “Contenidos principales y conclusiones de la tesis doctoral Crimen y violencia en la sociedad vizcaína del Antiguo Régimen (1550–1808)”, *Clío&Crimen* 8/2011, 488–490.

Therefore, it is possible to see that the juridical diversity so characteristic of the European Middle Ages survived in the Iberian Peninsula during the Early Modern Age. Moreover, it still exists in Biscay today to the point of being able to speak of a legal duality.

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Др Нере Јоне ИНЋАУШТЕГИ ЈАУРЕГИ\*

## ПРАВО, КАЖЊАВАЊЕ И САНКЦИЈЕ У БАСКИЈСКОМ ПРАВУ: ЈЕДАН ПРИСТУП БАСКИЈСКОМ КРИВИЧНОМ ПРАВУ

*Сажетак*

Овај рад се фокусира на проучавање казни и санкција у баскијском правном систему у различитим законима, нормама и уредбама који су биле на снази од XIII до XIX века.

Прво се представља територија, чији је главни град Билбао, и различити закони и прописи који су се користили у том периоду. Сви ти прописи били су баскијског порекла и користили су се искључиво на њеној територији. Затим се расправља о најчешћим казнама и санкцијама. Осим тога, дају се конкретни примери који обухватају суђења која су се одвијала током тих векова. Да би се то постигло, користе се документи из различитих архива. Сматрам да је ово последње веома важно јер су ти документи практични одраз правне теорије.

Циљ рада је пружити преглед баскијског кривичног права са теоријске тачке гледишта, али и његову примену у примерима који се могу наћи у архиву.

Кључне речи: *Баскијско право*. – *Баскија*. – *Фуеро*. – *Казна*. – *Рани нови век*.

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\* *Ванредни професор на Универзитету у Деустоу, nere.intxaustegi@deusto.es*  
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